EDITOR'S NOTE

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No. 85-1765-ASX
Status: GRANTED

Title: Bankers Life and Casualty Company, Appellant
v.
Lloyd M. Crenshaw

Docketed:
April 25, 1986

Court: Supreme Court of Mississippi

Counsel for appellant: Olson,Theodore B.

Counsel for appellee: Friedman,Paul R.

Entry	Date	Note	Proceedings and Orders
2	Mar 12 1986		Application for stay filed (A-694), and order denying same by White, J. on March 15, 1986
3	Mar 17 1986		Application for stay (A-694) refiled with Burger, C.J.
4	Mar 18 1986		Application for stay (A-694) distributed to the Court March 28, 1986
1	Apr 25 1986	G	Statement as to jurisdiction filed.
5	May 27 1986		DISTRIBUTED. June 12, 1986
6	May 28 1986	X	Motion of appellee Lloyd M. Crenshaw to dismiss filed.
7	Jun 2 1986		Reply brief of appellant Bankers Life & Casualty Co. filed.
8	Feb 23 1987		REDISTRIBUTED. February 27, 1987
9	Feb 27 1987		Relisted by Justice Powell for March 6, 1987
10	Mar 2 1987		REDISTRIBUTED. March 6, 1987
11	Mar 9 1987		PROBABLE JURISDICTION NOTED. Justice Stevens OUT.
			**********
13	Apr 9 1987		Order extending time to file brief of appellant on the merits until May 22, 1987.
14	May 7 1987		Record filed.
15	May 7 1987		Certified original record on appeal, 8 volumes, received.
17	May 11 1987		Order extending time to file brief of appellee on the merits until July 13, 1987.
18	May 15 1987		Order further extending time to file brief of appellant on the merits until May 29, 1987.
19	May 29 1987		Brief amici curiae of American Council of Life Insurance, et al. filed.
20	May 29 1987	G	Motion of Alliance of American Insurers, et al. for leave to file a brief as amici curiae filed.
21	May 29 1987		Brief of appellant Bankers Life & Casualty Co. filed.
22	May 29 1987		Brief amici curiae of Aetna Life Insurance, et al. filed.
23	May 29 1987		Brief amicus curiae of Johnson & Higgins filed.
24	May 29 1987		Brief amici curiae of CBS, Inc., et al. filed.
25	Jun 15 1987		Motion of Alliance of American Insurers, et al. for leave to file a brief as amici curiae GRANTED. Justice Stevens OUT.
26	Jul 13 1987		Brief amicus curiae of Assn. of Trial Lwyers of America filed.
27	Jul 13 1987		Brief amicus curiae of Natl. Insurance Consumer Organization filed.
28	Jul 13 1987		Brief amicus curiae of Attorney General of MS filed.
29	Jul 13 1987		Brief amicus curiae of MS Trial Lawyers Assn. filed.
30	Jul 13 1987		Brief of appellee Lloyd M. Crenshaw filed.

No. 85-1765-ASX

Entry	Date	Note	Proceedings and Orders
31	Jul 13 1987		Brief amici curiae of Consumers Union of U. S. et al. filed.
32	Jul 13 1987		Brief amici curiae of Arizona Trial Lawyers Assoc., et al. filed.
34	Jul 15 1987		Brief amicus curiae of Insurance Consumer Action Network filed.
35	Jul 27 1987		Joint appendix filed.
36	Jul 27 1987		Twelve copies of lodging received.
38	Aug 13 1987		CIRCULATED.
39	Oct 9 1987		SET FOR ARGUMENT. Monday, November 30, 1987. (4th case).
40	Nov 20 1987	X	Reply brief of appellant Bankers Life & Casualty Co. filed.
41	Nov 24 1987		Lodging received.
42	Nov 30 1987		ARGUED.
43	Dec 2 1987	G	Motion of appellee for leave to file a supplemental brief after argument filed.
44	Dec 2 1987		DISTRIBUTED. Dec. 4, 1987. (Above motion).
45	Dec 3 1987		Opposition of Bankers Life and Casualty Co. to motion of appellee (CONDITIONAL) for leave to file a supplemental brief after argument filed.
46	Dec 7 1987		REDISTRIBUTED. Dec. 11, 1987. (Conditional motion of appellee for leave to file supplemental brief after arg.).
47	Dec 14 1987		Motion of appellee for leave to file a supplemental brief after argument GRANTED. Justice Stevens OUT.

85-1765
No. 85-

FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant
**Counsel of Record*

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL
COPELAND, COOK, TAYLOR
& BUSH
Post Office Box 2132
Jackson, Mississippi 39225-2132

TERENCE P. ROSS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

1. Whether *Miss. Code Ann.* § 11-3-23 (Supp. 1982), under which a mandatory penalty of fifteen percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, irrespective of the meritoriousness of the appeal, but which imposes no corresponding burden on the appeal of an unsuccessful plaintiff-appellant, whether frivolous or not, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the $1,600,000 punitive damage award against appellant on an insurance claim of $20,000 violates the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, and is otherwise invalid under the Contract Clause and the Due Process Clause of the Fourteenth Amendment, because it is grossly disproportionate to actual damages and vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities, and because it was imposed under a standard of conduct newly formulated by the court below in this case and applied retrospectively to conduct that occurred almost seven years before that standard of conduct was announced.*

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* All parties to this case are named in the caption. Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of appellant: Bankers Life and Casualty Company

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is the wholly owned subsidiary of I.C.H. Corporation; Bankers Life and Casualty Company has controlling interest in, but does not wholly own, the Western Life Assurance Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From The Supreme Court of Mississippi

JURISDICTIONAL STATEMENT

Bankers Life and Casualty Company, the appellant, appeals from the final decision and order of the Supreme Court of Mississippi dated September 11, 1985, affirming a judgment of the Circuit Court of Jackson County awarding appellee the sum of $20,000 actual damages and $1,600,000 punitive damages for breach of an insurance contract, plus interest and costs, and imposing a mandatory penalty of fifteen percent additional damages on appellant pursuant to *Miss. Code Ann.* § 11-3-23 (Supp. 1982); and the order of the Supreme Court of Mississippi dated February

26, 1986, denying appellant's Petition for Rehearing and Motion to Correct Judgment which sought reconsideration of that court's September 11, 1985 decision and order. The decision and orders of the Supreme Court of Mississippi have denied appellant protections guaranteed to it by the Excessive Fines Clause of the Eighth Amendment as made applicable to the States by the Due Process of the Fourteenth Amendment and by the Contract Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

OPINIONS BELOW

The opinions of the Supreme Court of Mississippi dated September 11, 1985, and opinions dissenting, are reproduced in App. A., *infra*, 1a-101a, and are reported at 483 So.2d 254 (Miss. 1985). That court's order of that same date affirming the trial court's judgment and assessing a fifteen percent penalty against appellant is reproduced in App. B, *infra*, 102a, and is unreported. The order of the Supreme Court of Mississippi dated February 26, 1986, denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Judgment, is reproduced in App. C, *infra*, 103a, and is unreported. The order and judgment of the Circuit Court of Jackson County, dated December 3, 1981, is reproduced in App. D, *infra*, 104a-105a, and is unreported; the Circuit Court issued no opinion.

JURISDICTION

The September 11, 1985 decision and the September 11, 1985 and February 26, 1986 orders of the Supreme Court of Mississippi necessarily upheld, *sub*

silentio, *Miss. Code Ann.* § 11-3-23 (Supp. 1982), against appellant's claim under the Equal Protection Clause of the Fourteenth Amendment that § 11-3-23 is unconstitutional. The September 11, 1985 order assessing a fifteen percent penalty against appellant issued automatically as a consequence of the September 11, 1985 decision of the Supreme Court of Mississippi affirming the judgment of the trial court. The penalty was not part of any appealable judgment until that time. Thus, consistent with over a century of accepted Mississippi practice, appellant's federal constitutional challenge to this statute, Question 1 presented to this Court, was properly presented in appellant's Motion to Correct Judgment and Brief in Support of Motion to Correct Judgment, dated October 11, 1985, App. E, *infra*, 106a-120a.[1]

A notice of appeal of this case to this Court was timely served and received by the court below on April 9, 1986, App. F, *infra*, 121a-122a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Question 2 was duly presented to the Supreme Court of Mississippi as discussed *infra* and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the February 26, 1986 order of the Supreme Court of Mississippi denying appellant's

[1] Appellant filed a Petition for Rehearing, pursuant to Mississippi Supreme Court Rule 14, in which it sought rehearing of the affirmance of the trial court's judgment, and a Motion to Correct Judgment, pursuant to Mississippi Supreme Court Rule 19, in which it presented for the second time its federal constitutional challenge to § 11-3-23.

Petition for Rehearing and overruling appellant's Motion to Correct Judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

2. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

3. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

4. The Contract Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

5. Section 11-3-23 of the Mississippi Code Annotated (Supp. 1982) provides, in pertinent part, that:

> "In case the judgment or decree of the court below be affirmed, or the appellant fails to

prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment be for a sum of money, the damages shall be upon such sum . . . ."

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that a judgment imposing $1,600,000 in punitive damages for failure to pay a $20,000 insurance claim, and the imposition on appellant of a mandatory fifteen percent penalty ($243,000) under *Miss. Code Ann.* § 11-3-23 (Supp. 1982), for its failure to prevail on appeal, have deprived appellant of substantial rights guaranteed by the Contract Clause and the Eighth and Fourteenth Amendments to the Constitution of the United States. The constitutional issues presented are substantial, and are intimately related to similar questions briefed and argued to, but not decided by, this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986), and pending before this Court in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986). These issues, as the following discussion demonstrates, were properly presented to the courts of Mississippi.

A. Facts Relevant to the Constitutional Questions Presented

In January of 1979, appellee, Lloyd Crenshaw, was employed at the White Stores in Pascagoula, Mississippi. City Products Corporation, the parent corporation of White Stores, had in effect a group accident insurance policy with appellant. App. A, *infra*, 1a,

483 So.2d, at 256. The policy provided scheduled amounts for accidental loss of limb (among other disabilities). Appellee was covered by this policy.

Testimony at trial indicated that on January 6, 1979, appellee was repairing an automobile alternator in his home garage when part of the alternator fell and struck the top of his right foot. On January 8, appellee went to the Emergency Room at the Keesler Air Force Base due to swelling in his right foot. Appellee was treated by Air Force physicians and released that same day.

Several other visits to that hospital ensued. On January 13, appellee's foot swelled again and turned dark. Appellee returned to the hospital on January 14, 1979. Appellee was admitted to the hospital, but his lower right leg progressively worsened despite treatment. On January 18, 1979 his lower right leg was amputated. The post-operative pathology report concluded: "RIGHT FOOT AND LOWER LEG: SEVERE ARTERIOSCLEROSIS OF THE ARTERIES. GANGRENOUS NECROSIS." App. A, *infra*, 8a, 483 So.2d, at 259.

In June of 1979, appellee filed a claim with appellant for the loss of his lower right leg. After study of all medical records submitted by appellee, appellant's medical director, a specialist in general and vascular surgery, advised appellant's claims department that the limb loss was due to severe arteriosclerosis and was therefore not an "accidental" loss covered by the policy. Accordingly, on June 11, 1979, appellant denied the claim.

After further communications from appellee failed to change appellant's view of the cause of the limb

loss, appellee initiated suit seeking payment of his $20,000 insurance claim and punitive damages for the tort of bad faith refusal to pay that claim. The case was tried before a jury in the Circuit Court of Jackson County, Mississippi commencing on December 1, 1981. On December 3, 1981, the jury returned a verdict in favor of appellee in the sum of $20,000 actual damages and $1,600,000 in punitive damages on the bad faith claim.

On appeal, five Justices of the court below joined an opinion by Justice Hawkins affirming the trial court's judgment of appellant's liability on the contract claim and the punitive damage award. Three Justices dissented on the issue of liability for punitive damages, taking the position that "it seems a bit farfetched that such an accident, ten days later, would necessitate amputation of the right leg six inches below the knee." App. A, *infra*, 61a, 483 So.2d, at 282.

With respect to the excessiveness of the punitive damage award, the court split five-to-four in affirming the $1,600,000 award. The majority, in an opinion by Justice Sullivan, stated its view that

> [w]hile no hard and fast rule may be laid down with regard to the maximum amount of punitive damages which may be awarded in a given case, it is difficult to imagine that . . . the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant.

App. A, *infra*, 52a, 483 So.2d, at 279. Those five Justices, calculating the award as being only .54421 percent of the net worth of appellant, concluded that

the award could not "be said to shock the judicial conscience." *Id.*

Justice Hawkins, who had authored the majority opinion as to appellant's liability for contract and punitive damages, dissented, referring to the $1,600,000 award as "grossly excessive," App. A, *infra*, 54a, 483 So.2d, at 279, and stating that he could not "agree with the concept the bigger they are the more we ought to zap them." App. A, *infra*, 56a, 483 So.2d, at 280. Justice Hawkins concluded that the punitive damage award should be reduced by more than fifty percent, to $750,000. App. A, *infra*, 60a, 483 So.2d, at 282.

Three Justices dissented as to the award of *any* punitive damages, taking the position that "the majority en route to affirmance has wholly departed from [the Supreme Court of Mississippi's] general substantive rules regarding the assessment of punitive damages." App. A, *infra*, 90a, 483 So.2d, at 296. They would, instead, have awarded $20,000 on the breach of contract claim, pre-judgment and post-judgment interest, and the appellee's reasonable and necessary attorneys' fees and legal expenses. App. A, *infra*, 94a, 483 So.2d, at 301.

B. The Federal Questions Were Properly Presented

Appellant recognizes that it bears the burden to persuade this Court of its jurisdiction over this appeal in the absence of any express reference in the opinion of the court below to the federal constitutional provisions relied upon by appellant in that court. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983).

1. Presentation of the Federal Constitutional Challenge to Miss. Code Ann. § 11-3-23 (Supp. 1982)

Question 1, challenging the constitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982), was presented for the first time in appellant's Motion to Correct Judgment, as well as the brief filed in support of that pleading. App. E, *infra*, 106a-107a, 110a-119a. This was the appropriate and logical time for appellant to present its constitutional challenge to that statute because there was no issue concerning the statute, nor any judgment or appealable order reflecting the application of that statute to appellant, prior to the issuance by the Supreme Court of Mississippi of its September 11, 1985 decision and order. Appellant's challenge to § 11-3-23 was raised at the first opportunity after entry of the order affirming the judgment of the trial court. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1929).

Since at least 1882, the Supreme Court of Mississippi has recognized that questions regarding the implementation of § 11-3-23 and its predecessor statutes are appropriately raised by way of a post-affirmance motion in that court. *Tigner* v. *McGehee*, 60 Miss. 242 (1882). The court below entertained and rejected in post-affirmance proceedings an identical federal constitutional challenge to § 11-3-23 in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). No case in the court below suggests that this challenge to § 11-3-23 was not timely presented as a matter of state law. The same is true in every other court which has been called upon to apply § 11-3-23 or its Alabama counterpart, § 12-22-72, *Code of Alabama* (1975).[2] Thus, the failure

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[2] Although the question when a challenge to § 11-3-23 must

of the court below expressly to rule on this federal constitutional challenge to § 11-3-23 in denying the Motion to Correct Judgment in no way undermines this Court's appellate jurisdiction over this case. *See Illinois* v. *Gates*, 462 U.S., at 220 n.2.

2. Presentation of the Federal Constitutional Challenge to the Excessiveness of the Punitive Damage Award

Appellant first challenged the excessiveness of the punitive damage award in its post-trial motions urging remittitur and a new trial. Appellant could not have known that punitive damages, if awarded at all, would be excessive until after the jury's verdict was rendered. *See Chambers* v. *Mississippi*, 410 U.S. 284,

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be raised in order to be considered by the court below is technically an issue of Mississippi law, appellant's assertion that such a challenge should be raised by post-affirmance motion is not only not contradicted by any case in the court below but is also recognized as appropriate by the only other court which has been called upon to apply § 11-3-23. Thus, the Fifth Circuit has entertained and decided in post-affirmance proceedings various questions arising out of application of § 11-3-23 to diversity cases coming to it on appeal from the federal district court in Mississippi. *See, e.g., Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

The same understanding also governs with respect to challenges to Alabama's virtually identical appeal penalty statute, § 12-22-72, *Code of Alabama* (1975), in both the Alabama courts, *see, e.g., Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971) (federal constitutional challenge in post-affirmance proceedings to § 12-22-72 decided against the challenge), and in the Eleventh Circuit, *Burlington Northern R. Co.* v. *Woods* No. 85-1088 *(cert. granted*, March 24, 1986) (post-affirmance federal constitutional challenge denied *sub silentio*).

290-91 n.3 (1973) (federal claim timely presented because it could not have been raised and ruled upon prior to conclusion of trial). The trial court squarely held that it was without *power* to reduce *any* punitive damage award. App. A, *infra*, 51a-52a, 59a, 483 So.2d, at 278-79, 281. Appellant's challenge to the excessiveness of the punitive damage award was renewed on direct appeal to the Supreme Court of Mississippi; appellant expressly invoked the Due Process Clause of the Fourteenth Amendment in support of its challenge to the punitive damage award on direct appeal, App. G, *infra*, 124a-136a, and renewed its Due Process Clause challenge in its Petition for Rehearing and brief in support thereof, App. H, *infra*, 137a-152a.

A majority of the court below, without explicit reference to the fact that appellant's challenge to the excessiveness of the award was expressly grounded in the Due Process Clause of the Fourteenth Amendment, disapproved the trial court's decision regarding that court's *power* to reduce punitive damage awards as excessive, App. A, *infra*, 51a-52a, 483 So.2d, at 278-79, and then proceeded to reject appellant's argument that the award was excessive. Appellant's presentation of this federal question therefore complies with this Court's articulated standards respecting the proper presentation of federal questions to state courts even though the court below made no reference to the Due Process Clause in its opinion.

Appellant is unaware of any case in this Court holding that a federal question raised in this fashion and in these circumstances nevertheless fails of proper presentation because the highest state court fails, in ruling against a litigant, to cite to the federal con-

stitutional provision relied upon by that litigant. *See Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 231-32 (1896). By expressly holding that it was without authority to reduce the punitive damage award, the trial court deprived appellant of "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by that court." *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190, 194-95 (1925). Appellant presented its federal constitutional challenge to the excessiveness of the punitive damage award to the Supreme Court of Mississippi, squarely relying on the Due Process Clause.[3] Appellant could have done no more.

C. The Federal Questions Presented Are Substantial

The general substance of these questions was briefed and argued to this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986). Accordingly, because the Court is already quite familiar with the questions involved, appellant will only briefly set forth its arguments that the questions are substantial.

1. The Unconstitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982)

Under *Miss. Code Ann.* § 11-3-23 (Supp. 1982), litigants who unsuccessfully appeal from money judg-

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[3] Appellant also relies in this Court on the Excessive Fines Clause of the Eighth Amendment in arguing that the punitive damage award is unconstitutional. That Clause is made applicable to the States by the Due Process Clause of the Fourteenth Amendment and may therefore be invoked in this Court, *see Robinson* v. *California*, 370 U.S. 660 (1962); the Excessive Fines Clause argument is but an "enlargement" of the argument made to the court below and therefore that Clause may be invoked here. *See Dewey* v. *Des Moines*, 173 U.S. 193, 194-95 (1899).

ments are automatically penalized an additional fifteen percent of the original judgment. Although most States have in place, by statute or rule, mechanisms designed to deter frivolous appeals, Mississippi is apparently the only State, other than Alabama,[4] to impose a non-discretionary, mandatory penalty upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal.

If § 11-3-23 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably severe, because it punishes those who pursue non-frivolous appeals in an extravagant sum totally unrelated to the costs imposed by that appeal on the appellee. At the same time, it is irrationally underinclusive because a plaintiff who fails to recover a money judgment at trial may take an unsuccessful appeal on wholly frivolous grounds without the risk of any comparable penalty whatsoever.[5]

The fundamental irrationality in the operation of § 11-3-23 is made even more irrational by the decision of the Fifth Circuit in *Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984). In *Walters* v. *Inexco Oil Co.*, 440 So.2d 268 (Miss. 1983), the

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[4] The Alabama automatic penalty statute, § 12-22-72, *Code of Alabama* (1975), at issue in *Burlington Northern* does not differ materially in its operation from § 11-3-23.

[5] The interests of a judgment creditor in Mississippi are protected by *Miss. Code Ann.* § 75-17-7 (Supp. 1982), which provides for post-judgment interest from the date of entry of the judgment until the judgment is paid. Mississippi has no statutes or rules under which a party taking a completely frivolous appeal is subjected to monetary sanctions based upon the frivolousness of its appeal.

Supreme Court of Mississippi, on certification from the Fifth Circuit, held that § 11-3-23 confers a substantive right on plaintiffs for purposes of application of the doctrine laid down in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Although the Fifth Circuit initially accepted that view of the Supreme Court of Mississippi, *see Walters* v. *Inexco Oil Co.* 725 F.2d 1014 (5th Cir. 1984), later that year the Fifth Circuit, all judges concurring, reversed itself and declared that § 11-3-23 would not be implemented by that court. *Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984).

In *Affholder*, the Fifth Circuit pointed out that § 11-3-23, unlike Rule 38, Fed. R. App. P., "penalizes those [appeals] that are merely unsuccessful" and "acts as a deterrent to exercise of the right to appeal." 746 F.2d, at 309. Thus, the *Affholder* decision not only recognizes that § 11-3-23 imposes a deterrent on the right to appeal, but it creates yet another class of litigants in Mississippi which is not subjected to the arbitrary imposition of a large penalty for exercising, unsuccessfully, their right to appeal.

Appellant submits that § 11-3-23 is simply irreconcilable with, and must be struck down under, the reasoning of *Lindsey* v. *Normet*, 405 U.S. 56 (1972). In *Lindsey*, this Court invalidated an Oregon statute that required a particular class of losing defendants, tenants, to post a double bond in order to appeal from a judgment in favor of their landlord. The Court stated that a State may act "to discourage patently frivolous appeals . . . if [its] rules are reasonably tailored to achieve these ends and if they are uniformly

and nondiscriminatorily applied." *Id.*, at 78. Section 11-3-23 fails all these tests.

If, as the Aetna Life Insurance Company argued to this Court in No. 84-1601, and as the Burlington Northern Railroad Company argues in its petition for certiorari in No. 85-1088, Alabama's less severe (ten percent) appeal penalty functions to deny losing appellants an equal opportunity to pursue their right of statutory appeal within the Alabama courts and the right of appeal within the federal court system in diversity cases, then the need for this Court to address this question in this case is manifest.[6]

2. The Excessive Fines and Due Process Clause Questions

The question whether the Excessive Fines Clause applies to a punitive damage award that is grossly disproportionate to punishments imposed by the State of Alabama for similar conduct, and to the conceded actual harm, was briefed and argued in a similar case, *Aetna Life Insurance Co.* v. *Lavoie*, *supra*. The arguments advanced to the Court by the appellant in *Aetna* are fully relevant to this case because, as stated by the court below, the purpose of punitive damages in Mississippi is "to punish defendant and to provide a substantial deterrent to it and others similarly situated. . . ." App. A, *infra*, 50a, 483 So.2d, at 278. In Mississippi, "the amount of punitive damages is a

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[6] If this Court were to decide in *Burlington Northern* that § 12-22-72 is "procedural" for purposes of *Erie* and that therefore the penalty assessed under § 12-22-72 against Burlington Northern was wrongly assessed, this Court would presumably not reach Question 1 presented in Burlington Northern's petition for certiorari—whether § 12-22-72 is unconstitutional under the Fourteenth Amendment.

matter committed solely to the . . . discretion of the jury." App. A, *infra,* 51a, 483 So.2d, at 278.

The punitive damage award here, $1,600,000, is 80 times greater than the insurance claim. Furthermore, had appellant been charged under Mississippi criminal statutes governing fraud in the procurement of payment or obligation for payment of insurance premiums and found guilty thereunder, appellant would have been assessed a maximum fine of $500. *Miss. Code Ann.* § 83-17-1 (1972). Thus, the punitive damage award in this case is 3200 times the maximum punishment assessed by the legislature of Mississippi for business misconduct which has been adjudicated to be a crime.

A fine imposed by a jury subject to no standards in its imposition and which is 3200 times greater than the relevant statutory fine for the closest analog criminal offense is without doubt excessive under the Eighth Amendment as interpreted and applied in *Solem* v. *Helm*, 463 U.S. 277 (1983). The only offense of which appellant was found "guilty" below was the offense of refusing to pay an insurance claim based on the determination that the claim was not a valid one. For reasons known only to the jury, a confiscatory penalty was imposed on appellant after the appellee had been made whole in damages. This punishment bears no rational relationship to either the alleged harm inflicted on the appellee, *id.*, at 290-91, or to the punishment prescribed for analogous conduct made criminal by the Mississippi legislature, *id.*, at 293-95, 298-99.

As this Court's decision in *Solem* v. *Helm* also establishes, the historical roots of the Excessive Fines Clause and the "principle that a punishment should

be proportionate to the crime" may be traced back to Magna Carta's regulation of "excessive amercements." 463 U.S., at 284. Indeed, as the Court observed in *Solem*, the guarantees in Magna Carta against the imposition of excessive fines were not "hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. The case relied on by the Court to support this statement, *Le Gras* v. *Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), illustrates the application of the excessive amercement principle of Magna Carta to a fine imposed in a civil proceeding. That principle, incorporated into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2, and subsequently into the Virginia Declaration of Rights (1776), was then enshrined in the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10.

Appellant was not charged with violation of Mississippi's criminal laws; instead, appellant was sued for failure to perform an alleged $20,000 contractual obligation. For this omission, appellant has been punished in a manner 80 times more severe than the actual damage its conduct allegedly caused and 3200 times greater than if it had committed and had been convicted by a unanimous jury convinced beyond a reasonably doubt of insurance fraud. Whether the principle of proportionality passed down from Magna Carta requires the reduction of the fine imposed in this case is a substantial question warranting this Court's plenary consideration.

Whether addressed under the Excessive Fines Clause or directly under the Due Process Clause of

the Fourteenth Amendment, the gross disproportionality of the fine in this case, exacerbated by the magnifying effect of the additional fifteen percent penalty imposed by § 11-3-23, presents a substantial federal question. As a matter of common sense, such capricious penalties cannot and will not deter decision-making and conduct such as that at issue in this case; nor has the Mississippi legislature found that such penalties serve any purpose in Mississippi. No insurer in appellant's position can determine what conduct it must avoid in the course of performance of its contractual duties so as to avoid the imposition of severe and unpredictable fines. The decision of appellant to deny appellee's claim was made on the basis of multiple reviews of appellee's medical file by a physician with distinguished credentials as a general and vascular surgeon who concluded that, as indicated in the post-operative pathology report, the loss of the limb was the result of severe arteriosclerosis. The fact that the jury disagreed with that thoroughly considered opinion is insufficient to sustain the punitive damage award in this case.

Furthermore, as pointed out by the Justices of the court below who dissented with respect to the award of any punitive damages, this award could be upheld only by modification of the substantive rules previously laid down in several decisions of the court below and by establishment of a new substantive rule under which punitive damages are now assessable against an insurer under different and lesser standards than the standards applicable in other punitive damage cases. App. A, *infra*, 90a, 483 So.2d, at 296.[7] As this Court stated in *Aetna*, slip op., at 8,

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[7] In its Petition for Rehearing, App. H, *infra*, 137a, appellant

> We need not blind ourselves to the fact that the law in the area of bad faith refusal-to-pay claims ... [is] unsettled ..., as the court's close division in deciding this case indicates.

The decision below is neither an aberration nor necessarily the most shocking example of arbitrary, capricious and uncontrolled punitive damage awards in Mississippi. Another Mississippi jury recently awarded $6,000,000 in punitive damages in a case in which the plaintiff was compensated by a separate award of $50,000 for mental anguish after recovering nothing on his contract claim. That case is currently on appeal to the Supreme Court of Mississippi.[8] In the

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argued that the affirmance of the punitive damage award required the court below to overrule several of its prior decisions, resulting in a decision which "changes the law" in Mississippi in violation of the Fourteenth Amendment. Appellant could not, of course, have anticipated these changes in Mississippi law. Whether addressed under the Fourteenth Amendment or the Contract Clause, Art. I, § 10, cl. 1 of the Constitution (which appellant will also invoke in this Court), the application of new substantive rules of law to conduct occurring well before the announcement of such rules advances no significant state interest and is unconstitutional where, as here, it results in the imposition of a substantial burden on the underlying contract of insurance. If the existing judge-made tort rules governing the award of punitive damages in Mississippi had been deemed inadequate, as applied to insurance companies, by the legislature of Mississippi in 1985, it is clear that statutory modification to those rules by the Mississippi legislature would raise a substantial issue under the Contract Clause if the Mississippi legislature had attempted to impose new rules retrospectively on insurance contracts to the detriment of insurers. *Cf. Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

[8] *Life and Casualty Insurance Company of Tennessee* v. *Bris-*

absence of a decision by this Court holding that the Excessive Fines Clause controls the size of punitive damage awards, the court below will once again be free to defer to the jury's unbridled discretion. Indeed, as indicated *supra*, the Supreme Court of Mississippi did not even seriously review the "excessiveness" of this award, stating that "it is difficult to imagine that, consistent with the rules of law [under which it reviewed requests to reduce verdicts], the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant." App. A, *infra*, 52a, 483 So.2d, at 279.[9]

The apparent rule of law in Mississippi is that punitive damage awards may be imposed in large and wholly whimsical sums by juries until they are so large that they "shock the judicial conscience," a characteristic which becomes recognizable only when the award reaches one percent of the defendant's net worth. Thus, for business judgments made by the scores every business day, insurance companies operating in Mississippi subject themselves to the imposition of enormous punitive damage awards by juries which have been given *carte blanche* by the

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tow, No. 18,556 (Cir. Ct. Lee Cty., Miss. Feb. 6, 1986). *See* App. I, *infra*, 153a.

[9] The State of Mississippi's legitimate interest in regulating the conduct of appellant extends only to insurance written in Mississippi. Thus, the license granted by the decision below to Mississippi juries to fine an insurer at least one percent of the net worth of all of the insurer's assets—even though virtually all of those assets are located outside of Mississippi and bear no relationship to the level of the insurer's business activity in Mississippi—constitutes a separate violation of the Due Process Clause of the Fourteenth Amendment.

Mississippi courts to create and impose their own system of fines in each and every case that goes to a jury.

This Court has the power and responsibility under the Eighth and Fourteenth Amendments to place constitutional restraints on such arbitrary awards. The punitive damage award here is excessive both in kind, because it serves no valid state purpose, and in degree, because it is grossly disproportionate to the actual damages and to the level of punishment imposed by the Mississippi legislature for analogous conduct.

CONCLUSION

Appellant's federal constitutional claims are substantial. It has been fined in an amount vastly out of proportion to the actual damages it was found to have caused. Its punishment has been imposed without any of the limits or protections that it would have enjoyed in a criminal proceeding in which its penalty would have been 3200 times less. Its punishment has been imposed under new substantive rules of law formulated by the court below in this case, years after its conduct occurred. Moreover, that result has been exacerbated by the non-discretionary imposition on appellant of an additional fifteen percent penalty, further multiplying the injustice, merely for exercising its right, in a legally and factually complex case, to appeal the judgment of the trial court.

This Court had before it the substance of these issues in a similar context in *Aetna Life Insurance Co.* v. *Lavoie.* In its decision in *Aetna,* this Court stated in unmistakable words that "these arguments raise important issues which, in an appropriate setting, must be resolved . . . ." Slip op., at 14. This case

clearly presents an "appropriate setting" in which to resolve these important issues. Appellant has pressed its federal constitutional challenges to this punitive damage award and to § 11-3-23 at every appropriate stage in this litigation.[10] Probable jurisdiction should be noted and this case set for argument.

April 25, 1986 Respectfully submitted,

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant
**Counsel of Record*

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[10] Appellant is clearly entitled to have applied to this case any ruling of this Court on Question 1 as presented in *Burlington Northern* or in any other case in which questions similar to those presented by appellant may be presented and decided. *See, e.g., Henry* v. *Collins*, 380 U.S. 356 (1965) (per curiam) (application of constitutional rule announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to libel judgment on certiorari to Supreme Court of Mississippi); *Hughes* v. *Hughes*, 441 U.S. 901 (1979) (application of decision in *Orr* v. *Orr*, 440 U.S. 268 (1979), to case on appeal from Supreme Court of Alabama notwithstanding that Alabama courts had held federal question not timely presented).

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL

COPELAND, COOK, TAYLOR
& BUSH
Post Office Box 2132
Jackson, Mississippi 39225-2132

(601) 354-0123

TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

APPENDIX

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW
Decided September 11, 1985

EN BANC.

Bankers Life and Casualty Company (Bankers Life) is a health and accident insurance corporation with principal offices in Chicago, Illinois. Lloyd M. Crenshaw is a resident of Pascagoula. Bankers Life appeals from a jury verdict and judgment of the Jackson County Circuit Court in favor of Crenshaw of $20,000 actual and $1,600,000 punitive damages, arising our of a claim for accidental loss of a lower right leg, alleged to be covered under a Bankers Life group insurance policy Crenshaw had through his employer, White Stores in Pascagoula, a subsidiary of City Products Corporation.

The main issues of this appeal are whether the question of punitive damages should have been submitted to the jury, and the propriety of the amount awarded.

We find the issue of punitive damages was properly submitted to the jury. A majority of the Court is of the opinion that the judgment of the lower court should be affirmed in its entirety.

HAWKINS, JUSTICE, FOR THE COURT, PART I:

FACTS

On January 18, 1979, Crenshaw's right leg was amputated about six inches below the knee by surgeons at Keesler Air Force Base Hospital. At the time he was 61 years old. Previous to that date Crenshaw had injured his right foot; however, there is some discrepancy in the record as to the precise date of the injury and nature of the trauma. We will give both Crenshaw's version and the history set out in the medical records.

January 6, 1979, was a Saturday. That evening he was working on his car's alternator when part of it rolled off his work bench and struck the front part of his right foot, just below where his shoelaces would have been had he been wearing shoes. Instead, he only had on socks and house slippers. He replaced the alternator on the car.

When he removed his house slippers, his foot was red and bruised, but not swollen. The skin was not broken. That night he took some aspirin.

The next day, Sunday, January 7, Crenshaw noticed that his foot had swollen during the night. He hobbled around the house that day, soaked his foot in warm water, and rested on his couch.

On Monday afternoon, January 8, Steven Crenshaw, an adult son living with his parents, drove Crenshaw to the Keesler base hospital, where he was seen in the emergency room. He was given medications and told to stay off his foot as much as possible.

Crenshaw testified he returned to the hospital, but did not state whether it was the next day or two days following. On this trip he said his foot was x-rayed and he was given a blood test. A splint was put on his leg and he was given crutches. On this trip he was told to keep

his foot elevated. Crenshaw testified when he elevated his foot that this eased the pain.

He made another trip to the emergency room when he was again checked, and released home. He returned Friday, January 12, at which time the wrapping was removed and he was again sent home.

The following day Crenshaw's foot was swelled again and had turned dark. On Sunday, January 14, his wife drove him back to the hospital, at which time he was admitted. Different Air Force physicians examined Crenshaw on his previous trips to the hospital.

During the week he was at home following his second visit to the hospital, Crenshaw stayed in bed, and in the day was not in great pain. At night, however, the pain increased and he could not sleep. When he first elevated his foot it hurt worse, but the pain would eventually ease. He characterized the injury to his foot as a bruise, with the pain so great he could not walk on it. Medication helped to ease the pain.

Mrs. Crenshaw saw her husband's foot the night of his injury. She said it was red and bruised looking, but the skin was not broken. She testified that the next day it started swelling and getting bluish-red looking.

Steven Crenshaw said the night his father injured his foot there was swelling, but that a "little black bruise on top of his foot" did not show up until the next day.

HOSPITAL RECORDS

The first medical record of this injury is a January 9, 1979 (Tuesday), emergency room report. That report states:

> 61 year old white male complaining of pain in right foot. Patient was driving auto and hit pole with foot on brake yesterday. Unable to stand on foot. Patient soaked foot in hot water last nite.

> Chief complaint: tingling across dorsum (top) toes of right foot, acutely tender at great right toe.
>
> O: swollen, tender right midfoot, especially base right first metatarsal (great toe).[1]
>
> Dorsalis pedis palpable (an artery in the foot, a continuation of the anterior tibial).

This January 9 report shows the x-ray negative, and the urinalysis (for possibilty of gout) as normal.

Crenshaw was diagnosed as having a "ligamentous injury metatarsal right foot". There is also a notation that the examiner discussed the case with Dr. Morrow, an orthopedist, and after consultation, a splint was applied, and Crenshaw was given analgesics for pain. He was given crutches, told not to bear weight on his foot, and told to return in a week to see an orthopedist. The examining physician was Dr. Thomas E. Scott, a resident.

There is also a sheet headed "CLINICAL RECORD CONSULTATION SHEET", which apparently is a request for consultation with the orthopedist. It is dated January 9. Under the sub-heading "Reason for Request" is the following handwritten notation: "61 year old white male struck on ball right foot with rebounding clutch. x-rays no fractures or dislocation. Please follow up ligament injury mid-foot." The provisional diagnosis is: "ligament injury 1st metatarsal-tarsal joint." This sheet is also signed by Dr. Scott, and the requested orthopedist is Dr. Morrow.

He was next seen January 11, with this notation: "Patient returned out of pain meds, was given 30 percodans 9Jan79." Dr. Scott, the physician on January 11, was concerned that Crenshaw might be taking too much pain med-

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[1] For the convenience of the reader, we have at times, in parenthesis, explained medical terms. We have also written out abbreviations except when the abbreviations, as they appear in the medical records can be clearly understood by the non-medical reader.

ication. Dr. Scott told Crenshaw to return to the orthopedist as planned.

The records show Crenshaw was seen on January 12 by Dr. Henry J. O'Neal, an internal medicine intern. Crenshaw presented himself as being out of pain medication. He also complained that he was not obtaining relief from the medication. There were no diagnostic tests run on either the January 11th or 12th visits.

The records show Crenshaw returned on January 14th and was again seen by Dr. O'Neal. Noted were swelling and red streaks progressing up the lower extremity, the foot swollen, and toes blue. A blister was noted on the back of his foot. The pulses were not palpable. There was a decreased sensation to pinprick of his extermity. There was also a mild enlargement of lymph nodes in the groin. X-rays to determine gangrene showed no gas in the soft tissues of the affected extremity. The red blood cell count was normal. The white blood cells were elevated to 13,300, being above the upper limit normal of 10,000. Dr. O'Neal's impression was a superficial infection with swelling and decreased vascular flow.

Dr. O'Neal noted the need for a surgery consultation, and Crenshaw's condition was recognized as being serious enough for him to be admitted to the hospital.

Dr. Dan L. Locker, chief resident on vascular surgery, examined Crenshaw, and his report that day recites the following:

> Ext. (external) - RLE (right lower extremity) - pitting edema from knee distal
>
> Pop (popliteal) doppler - strong
>
> PT (posterier tibial) - present 2 cm above mallelous - weak monophasic
>
> DP (dorsalis pedis) - present 2 cm above ankle line -weak monophasic

Perineal - present - biphasic at ankle line

Foot is pale - white with mottling Vth toe purple - distal half

Sensation decreased distal to MT-P (metatarsal - phalingeal) line

A (diagnosis) - Cynasis 2^0 (secondary) to swelling over 12 hr. duration confine to distal extremity (beyond ankle line).

P (recommend)(1) Elevate
(2)Anticoagulate with Heparin

Pt Ed (Patient Education) Pt (patient) informed of options and hi prob (high probability) of loss of part of foot

Staff - Pt. presented to Dr. Fontenelle who examined patient and agrees with plans.

Dr. Torma also notified.

Crenshaw was seen by Dr. Christopher T. Westphal, an Air Force general surgeon on January 17, 1979, who performed a surgical amputation on the following day. He was assisted by Dr. Dale V. Hoekstra, a Board certified orthopedist.

Dr. Westphal's operation report, dated January 23, in pertinent part states the following:

PREOPERATIVE DIAGNOSIS

Vascular insult, right foot

* * * * *

OPERATIVE DIAGNOSES

Same

* * * * *

FINDINGS:

The patient was found to have an ischemic right foot with a necrosis of the distal aspect. This was amputated in the manner about to be described. [Emphasis added]

PROCEDURE:

The patient was administered epidural anethesia. His right lower extremity was prepped and draped in a sterile manner. A tourniquet was applied with 450 mm. of mercury with a total tourniquet time of 14 minutes. A fishmouth apex of the incision approximately 6– below the tibia plateau. The anterior and posterior vessels were identified and ligated. Similarly, the peroneal vessels were identified and ligated with 2-0 silk suture material. The greater and lesser saphenous veins were also identified and ligated. The remainder of hemostasis was assured with electrocautery. At the time of operation, the stump was noted to be extremely ischemic and the muscles somewhat dusky looking with a little free bleeding at the time of operation. The posterior tibial nerve was grasped, cut and allowed to retract. The periosteum of the tibia was incised and elevated. The tibia was divided with a saw. Similarly, the fibula was divided approximately 1– shorter than the tibia. . . A Penrose drain was inserted in the base of the wound with the ends of the drain coming out of the incision bilaterally.

S/DALE V. HOEKSTRA, MAJ, USAF MC

The January 22 pathology report of the stump, notes: "Vasculature is unremarkable. The skin is mottled up to 5 cm. above the digits." It concludes as follows:

(A) Right Foot And Lower Leg: Severe Arteriosclerosis Of The Arteries. Gangrenous Necrosis

Dr. James P. Durning, Resident in Surgery, prepared the Narrative Summary of Crenshaw's problems on February 2, also signed by Dr. Locker. The pertinent portions of this summary read as follows:

DATE:

14 January 79

HISTORY OF PRESENT ILLNESS:

Lloyd Crenshaw is a 61 year old white male who presented to the emergency room at Keesler Medical Center on *14 Jan 79* with a complaint of *pain* in his right foot. *The patient was one week status post injury to his right ankle in an auto accident.* The patient had been *previously seen in the emergency room and was told to remain off his leg and keep it elevated. The patient failed to do this at home, and came in complaining of right foot pain.* On presentation to the emergency room, the *foot* was noted to be painful, *bluish-white, cool to exam,* with *absent distal pulses.* The patient was admitted, placed on Heparin therapy, and the foot was elevated.

PAST HISTORY:

The review of systems was essetially unremarkable. The patient has no history of pulmonary, cardiac or bowel disease. His chief complaint was as noted above. *Past medical history was also unremarkable.* Past surgical history was remark-

able for an appendectomy in 1951 and lysis of adhesions in 1977. Family history was noncontributory. *The patient is a heavy tobacco user.* He uses occasional alcohol. *He was on no medications at the time of admission.*

CLINICAL FINDINGS ON ADMISSION:

Clinical findings on admission *indicated a well developed, well nourished white male.* HEENT were unremarkable. Pulmonary examination revealed good breath sounds bilaterally without any rales or rubs. *Cardiac exam was unremarkable. No murmurs were heard.* Abdominal exam was also within normal limits with a soft, nontender abdomen and a long midline surgical scar. *Examination of the extremities was remarkable for a blue and cold, paresthetic right foot. There were no auscultable pulses in the foot. Necrosis of the distal toes was also noted.*

* * * * *

X-RAY STUDIES:

Chest x-ray was unremarkable. X-ray of the right lower extremity did not reveal any gas indicative of gas gangrene.

PROGRESS IN HOSPITAL:

The patient was admitted and placed on strict bedrest with *elevation of the right leg.* He was also placed on *Heparin therapy* at the time with constant monitoring of PT and PTT. Despite adequate *heparinization, the foot failed to resolve. On 18 Jan 79, the patient was transferred to the Surgery A Service and underwent a right below the knee amputation.* Amputation was performed under the direction of *Dr. Locker* and *Dr. Hoekstra of the Orthopedic Department.* Postopera-

tively, the patient did well. The stump has been healing well.

* * * * *

FINAL DIAGNOSIS:

1. *Anterior compartment syndrome, right leg.*
2. *Isthemia of right leg.*

[Emphasis added]

On April 9, 1979, Crenshaw filled out a proof of claim on the Bankers Life form, with a medical authorization for the insurance company to obtain all medical information it needed from any physician or hospital. No physician's statement was executed on behalf of Crenshaw because of an Air Force regulation. Bankers Life was notified of this regulation, and also informed that the Air Force would reproduce photocopies of all medical records and send these. The narrative summary, Dr. Westphal's operation report, and the pathology report were sent to Bankers Life when Crenshaw made his claim.

Bankers Life employed Equifax, Inc., an investigating agency, to investigate the claim. The agency interviewed Steven Frye, manager of the local store and also one of Crenshaw's neighbors, but did not obtain any medical records. Its report dated April 24, 1979, concluded:

> SUMMARY/SUGGESTION: We do suggest that you allow us to diary this case for some six weeks and go back into the area to interview Mr. Crenshaw. He is at the hospital five days per week, comes home on week-ends, and will be there an additional 5-6 weeks.

Equifax was not requested to perform any further services for Bankers life following this report.

William J. Herzau was supervisor of the Special Risks Claim Unit of Bankers Life. In this department William

A. Blessing and Robert N. Krol reviewed Crenshaw's claim along with Herzau.

Dr. Nathaniel P. McParland[2] is a physician, specializing in general and vascular surgery, and also a salaried employee of Bankers Life as Medical Director. His responsibility was to make medical judgments on claims, a job which constituted one-fifth of his practice.

Donald Lemersal was one of seven full-time attorneys constituting the legal department.

These individuals participated in the decision making process of Crenshaw's claim.

On June 19, 1979, Herzau sent Dr. McParland a memo explaining the final diagnosis, Banker's Life position and requesting an evaluation.

Dr. McParland replied by memo to Herzau the same date.

TO: William Herzau

FROM: N. P. McParland, M.D.

* * * * *

> Mr. Crenshaw's records have been reviewed. Noted is the absence of the record of the original injury. However, Mr. Crenshaw's loss of limb was not because of an anterior compartment syndrome, but because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and necrosis. The operative report indicates the obstructing arteriosclerotic area most likely is in the femoro popliteal artery area

---

[2] The trial record spells the doctor's surname as "McParlin" while the Bankers Life records and briefs spell it "McParland". We will use the latter spelling.

> though no mention of the femoral or popliteal pulses is noted.
>
> Mr. Crenshaw will most likely require futher amputative surgery.[3]

On July 11, 1979, Herzau wrote Mrs. Marilyn Doyle, Administrator of Employee Benefits of City Products Corporation, Crenshaw's employer:

> We now have the facts needed to service your claim.
>
> The above captioned policy is an accident only policy defining injury as:
>
> > "Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person."
>
> According to the medical information we have, it appears that Mr. Crenshaw's limb loss was because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and

---

[3] In this initial correspondence there was an obvious breakdown of information and communication. The question and answer of paragraph 3 of Crenshaw's proof of claim states:

"3. Describe fully *how* and *where* the accident occurred. (Answer) Removed alternator from wife car, and carried it to work bench. Removed armature from housing and was checking brg. on armature when housing rolled off bench and hit right foot."

Furthermore, on both the operation report signed by Drs. Westphal and Dale V. Hoekstra, orthopedic surgeon, and the pathologist's report the pre and operative diagnosis was "vascular insult, right foot." These reports were examined by Dr. McParland. The medical term "insult" means trauma. We will return to this perplexing failure to make further inquiry.

> necrosis and not due to *an injury as defined above.* Therefore, we cannot identify that a covered loss has occurred under the terms and interpretations of the policy.
> [Emphasis added]
>
> So, we sincerely regret that no benefits are payable.
>
> If we have in any way misinterpreted the information furnished us, or if there is additional information we should have, please let me know.

On July 10, 1979, the case reserve was reduced from $20,000 to $3,000.

On September 25, 1979, Herzau's denial was communicated to Crenshaw in a letter from Leon Mueller of White Stores, a subsidiary of City Products Corporation.

Thereafter, Crenshaw obtained the following statement dated October 5, 1979, from the Air Force:

> 1. Mr. Lloyd Crenshaw was hospitalized in late January 1979 where he underwent a below-the-knee amputation of the right leg. From a thorough review of his records dating back to 1972, I am unable to find any evidence of symptomatic atherosclerotic disease in his right lower extremity prior to the injury which ultimately caused him to undergo a right below-the-knee amputation. When seen in the Emergency Room initially for this injury, a dorsalis pedis pulse was palpable and documentation of this is substantiated in the records. This documentation was noted on 9 Jan 1979. Following the initial injury he developed a gangrenous right foot. He was admitted and a trial of heparinization and elevation in order to save the lower extremity was undertaken. This was not successful and as a result a below-the-knee amputation was performed. The specimen

> was submitted to pathology for diagnosis. At that time it was apparent to the pathologist that he had severe atherosclerosis of the arteries of the lower extremity.
>
> 2. I would feel that the atherosclerosis is an underlying condition and not the immediate cause of the gangrenous necrosis. The precipating event must be considered to be the trauma which intially brought him to the Emergency Room on 9 January.

This statement is signed by Dr. Dale V. Hoekstra, the orthopedist attending the surgery; Dr. Robert L. Morrow, chairman of the Department of Orthopedic Surgery; and Dr. Thomas T. Coolidge, Director of Hospital Services.

In answer to a letter from Mrs. Doyle stating Crenshaw wished to appeal his claim, Herzau replied on December 4, 1979, repeating Bankers Life's position as previously set out, stating in pertinent part:

> In order to reconsider this claim, we would need additional medical information showing that Mr. Crenshaw's loss was due to an *accidental bodily injury directly and independently of all other causes.* [Emphasis added]

An interoffice memo from Blessing to McParland dated March 27, 1980, notes the receipt of the correspondence from the three doctors dated October 5, 1979, and attaches it to the memo:

> Mr. Crenshaw underwent a right below knee amputation on January 18, 1979 after reportedly sustaining an injury to the leg on January 6, 1979.
>
> This claim was previously denied on the basis that the amputation was caused by vascular conditions rather than an injury.

> Mr. Crenshaw has advised that he would like to appeal this decision. He has furnished us with the attached medical report from the Department of the Air Force.
>
> *I see nothing in the report which would change our decision on this case.* However, we would appreciate it if you would review the file once again paying particular attention to this new information. [Emphasis added]
>
> Do you still feel that Mr. Crenshaw's limb loss was due to his vascular problem rather than his January 6, 1979 injury? Also, do you feel there is any additional information which would be helpful in making a determination? If so, what?

Dr. McParland's memo to Blessing dated April 2, 1980, states:

> The records again have been reviewed. Again noted is the admitting examination of this heavy smoker with a cold, pale, paresthetic, right foot with absent distal pulses. An anterior compartment syndrome would affect only the anterior tibial artery and dorsal pedal pulse. The posterior tibial artery is the major artery to the foot and this too was occluded producing the physical findings and the resultant amputation of the lower extremity. This was confirmed in the pathology report and, therefore I feel no *further information* is necessary to sustain our previous diagnosis. [Emphasis added]
>
> If I can be of further help, please call.

On April 8, 1980, Herzau wrote Crenshaw, stating: Our medical director has once again reviewed your file.

This policy is an accident only policy defining injury as:

> "Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person."
>
> According to all the medical information we have, it appears your limb loss was due to severe arteriosclerotic changes in the distal blood vessels and subsequent ischemia and necrosis and not due to *any injury as defined above.* This opinion was confirmed in the pathology report. Therefore, we cannot identify that a covered loss has occurred under the terms and interpretations of the policy. [Emphasis added]

Crenshaw then employed an attorney, who wrote Herzau on May 15, 1980, demanding payment, and stating that Crenshaw's trauma was a precipitating event to his trouble, as revealed by the medical records.

Herzau wrote Lemersal a memo on May 16, 1980, asking him to review the file, stating Crenshaw's lawyer had furnished no new information, and only an "opinion" that Crenshaw's condition came within the terms of the policy.

Lemersal replied to Herzau by memo dated June 19, 1980:

> I do not feel there is a legal question presented here at this time. Until *we know more about the condition and how* (and whether) *the alleged accident contributed* to cause the loss we cannot very well apply the Mississippi law regarding proximate cause.
>
> If an injury caused the loss we should have some further substantiation of this. I suggest that in writing to Attorney Schroeder you explain in

> some detail what our file contains and point out to him that we must have some substantiation that an injury caused this loss *"directly and independently of all other causes."*
>
> If there is further substantiation that the loss is the result of the combination of disease and accident Mississippi law holds that where "injury aggravates, renders active, or set in motion a latent or dormant pre-existing physical condition or disease . . ." there may be recovery under this type policy. Peerless Insurance Company v. Myers, 192 S 21 437 (1966, Miss. Sup.Ct.). However, we do not know what effect the alleged injury had on this condition, or whether the arteriosclerotic changes were dormant. [Emphasis added]

On July 15 Crenshaw's attorney responded with a strong letter, again requesting payment, explaining the position of Crenshaw that the trauma contributed to the problem causing the amputation. He quoted from the three physicians letter of October 5, 1979:

> I would feel that the atherosclerosis is an underlying condition and not the immediate cause of the gangrenous necrosis. The precipitating event must be considered to be the trauma which initially brought him (Crenshaw) to the Emergency Room on 9 January.

This letter again stated if the company wished to dispose of this case without litigation, to please forward payment.

A memo from Blessing to Herzau on July 23 states:

> Dr. McParland feels this limb loss is due to preexisting vascular problem. However, it appears *there is some evidence his physical condition deteriorated rapidly after this event.* Per Don Lemersal, Mississippi law holds that where "injury

> aggravates, renders active, or set in motion a latent or dormant pre-existing physical condition or disease. . ." there may be recovery under this type policy. In view of attorney Schroeder's letter of 5-15-80, I suggest we consider the possibility of a compromise. [Emphasis added]

On June 27 Herzau wrote Crenshaw's attorney, again denying coverage on the ground that there was no evidence that Crenshaw's alleged "injury caused this loss 'directly and independently of all other causes.' " Herzau also explained that it was the view of Bankers Life's medical director that:

> The *operative report indicates the obstructing arteriosclerotic area most likely is in the femoro popliteal artery area although no mention of the femoral or popliteal pulses is noted.*
>
> [Emphasis added]

Blessing wrote a memo to Lemersal on July 28:

> This 63 year old auto parts manager is claiming limb loss due to a January 6, 1979 injury to his right foot. A car part fell on his foot reportedly resulting in a below knee amputatior on January 18, 1979.
>
> Dr. McParland has reviewed this file twice and feels that this limb loss is due to a pre-existing vascular condition. However, there is some evidence that his physical condition deteriorated after this trauma.
>
> You previously advised us that Mississippi Law holds that where "injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease. . ." there may be recovery under this type policy.

> Please see Attorney Schroeder's letter of July 15, 1980. This letter contains no additional factual information regarding Mr. Crenshaw's medical problems. Rather, it contains Mr. Schroeder's interpretation of the previously submitted medical information. Since Mississippi is a penalty state, I request that you review this file and respond to Attorney Schroeder's letter.
>
> If you prefer, please advise what type of response we should give and I will write Attorney Schroeder.

Lemersal in turn contacted Dr. McParland, who wrote the following memo to Lemersal dated August 7:

> The records have been reviewed again. *Noted is the absence of an emergency room report* on the alleged injury which has been described on the discharge summary as a jarring injury to the right leg. On the narrative summary the patient gave a history of injury to his right ankle in an auto accident for which he was seen and advised in an emergency room. Mr. Crenshaw states he dropped an *armature onto* his right foot.
>
> His physical findings were that of complete arterial occlusion to foot and lower leg with necrosis of the distal tips of the toes.
>
> This severe occlusive arterial disease in this heavy smoker necessitated an amputation six inches below the knee, and the pathology report indicated severe arteriosclerosis indicative or relatively long standing disease.
>
> A diagnosis of anterior compartment syndrome and ischemia of the leg was the final diagnosis.
>
> If Mr. Crenshaw had an anterior compartment syndrome, which he did not, malpractice is in

evidence because the treatment is division of the fascia enclosing the musculature not leg amputation.[4]

If Mr. Crenshaw in reality did to his leg, foot or ankle depending upon which report is read, he either had no evidence of any injury, and therefore was sent home from the emergency room, or if there was injury again malpractice is in evidence because of lack of treatment in a severely diseased foot from atherosclerosis and the absence of any pulses. The treatment of choice being immediate hospitalization and heparin therapy.

Because of the absence of an emergency room report, I must conclude there was either no trauma or the trauma was insignificant.

Mr. Crenshaw suffered from severe occlusive arteriosclerosis of all arteries at least as high up as six inches below his knee, resulting in ischemia and gangreene [sic] of his foot.

* * * * *

In conclusion, Mr. Crenshaw has a very common disease for which various therapies are instituted in virtually every hospital in the country. No trauma is necessary to produce the end results suffered by Mr. Crenshaw *and from the reports presented,* I feel the alleged *trauma has not been documented,* and even if all three areas were traumatized at one time, there would be no cause and effect situation.

---

[4] Dr. McParland was correct in his conslusion that "anterior compartment syndrome" was not the correct diagnosis of Crenshaw's problem.

> So, we sincerely regret that the policy does not permit payment of benefits.

Crenshaw instituted suit November 10, 1980, for $20,000 actual damages and $400,000 punitive. The declaration was later amended to claim $1,635,000 in punitive damages.

At trial in December, 1981, three physicians testified: Dr. Perry J. Hockaday and Dr. Westphal, who testified for Crenshaw; and Dr. McParland, who testified for Bankers Life. Neither Dr. Hockaday nor Dr. McParland had treated or examined Crenshaw.

DR. HOCKADAY

Dr. Hockaday is a general surgeon who had been practicing 15 years in Pascagoula. Prior to this he was a surgeon in the Air Force. In answer to a hypothetical question, he testified that the amputation was a result of injury. The precipitating cause in his opinion was trauma, probably combined with arteriosclerosis of a severe nature. He testified that one of the common causes of people who have loss of limbs with arteriosclerosis was accidental trauma. The trauma did not have to be severe. He explained that the patient would have an inability to heal the wound by virtue of poor blood flow to the extremities. Further, a person with poor blood flow such as Crenshaw was more susceptible to severe complications from minor injuries because any swelling would result in a further decreased blood flow to an area already experiencing poor circulation.

In making a determination of whether there was an arterial occlusion independent of any trauma or whether trauma played some part in the problem, Dr. Hockaday testified the entire medical record needed to be examined, not just portions of it as seen by Dr. McParland. Of utmost importance to Dr. Hockaday was the emergency room report, which documented an injury of some type to Crenshaw, distinguishing him from someone who simply came in off the street with a need to have his leg amputated.

Dr. Hockaday testified (Record, P.670):

> We're dealing with swelling, and swelling is the culprit. We're talking about a long-standing disease that has evolved over 61 years and a gradual diminished flow. . . a flow that has not diminished to the point of creating a problem by itself solely, but with that little bit that tips it over—and that is the swelling of the foot and the shutdown of the circulation in the toes. . . And that's where usually gangrene of this nature starts, in the toes, rather than a diffuse problem.

He was of the opinion that the dark, dusky muscle and tissue observed by the pathologist could have been caused by the tourniquet used during surgery.

He stated that a person with arteriosclerosis who sustains an injury presents a very hard problem to the doctor, who hopes the patient will have enought circulation to heal the wound. Yet, there is no way to make the swelling go away, and it is a matter of waiting and hoping.

He stated that people who have amputations solely from vascular problems will usually have a history of leg pains, and severe pain in walking. Their troubles are progressive, not spontaneous.

DR. WESTPHAL

Dr. Westphal gave a deposition by video tape which was introduced at trial. He testified he first saw Crenshaw on January 17, the day before surgery. He reviewed the medical records, and in his opinion Crenshaw already had a decreased flow of blood because of arteriosclerosis, but that situation was compounded by trauma.

He testified that the swelling caused a further decrease in blood flow to the foot, that the blood flow would not take care of waste, and the injury would not heal. He

stated that the flow of blood may have caused a thrombosis, or clot to develop locally in the arteries at the very end of the foot, and that as a result of the low flow state, impoverished by swelling, that tissued died and gangrene developed.

Dr. Westphal acknowledged it was perfectly conceivable that Crenshaw could have presented himself in the emergency room one day with a cold foot and no pulses on basis of an obstruction either from an embolism, or the blood flow to the foot was so slow due to gradual blockage that the artery had clotted. He testified this was seen relatively frequently; in fact, in most cases this was how physicians saw people with peripheral artery disease. He also acknowledged this possibility in Crenshaw's case.

The distinction to Dr. Westphal in Crenshaw's case was that Crenshaw did have trauma to his right extremity, and he was of the opinion this aggravated a pre-existing condition which led to loss of the extremity.

He acknowledged one could say it was just a coincidence that he had trauma, and would have lost his extremity, anyway; however, he expressed his opinion as follows:

> I can simply state that having been there a few days down the line and having reviewed those records, I believe it was a situation where trauma came, compounding atherosclerosis, and led to loss of the foot.

He was of the opinion that most likely there would have been some previous symptoms, such as pain in walking, if atherosclerosis alone had caused the amputation.

Dr. Westphal also was of the opinion that while the documents seen by Dr. McParland would give a general idea as to what was wrong with the patient and what happened to him, they were not sufficiently accurate to make many judgments concerning the patient. The physician needed to go specifically to the entire medical re-

cord, not simply the summary. The pathology report was insufficient, in his opinion, and also inaccurate as to the location of the amputation. There was also a discrepancy in the pathologist's finding upon a visual inspection of the blood vessels as normal, while the microscopic diagnosis revealed severe atherosclerosis of arteries and gangrenous necrosis. Dr. Westphal apparently felt some clinical observation should have supported the microscopic diagnosis.

Significant to Dr. Westphal was a review of Crenshaw's hospital records since 1972 which disclosed no evidence of symptomatic atherosclerotic disease prior to 1979. This would have indicated a definite predisposing cause to eventual amputation. It was not uncommon for a patient with hardening of the arteries to develop symptoms on exercise, and as the disease progressed, less exercise would cause pain. Also, he would have pain just from the disease if an artery were blocked. Crenshaw was a fairly active man, employed full time, with hobbies such as golfing, fishing, and outdoor recreation.

Dr. Westphal explained that thrombosis was a blood clot. In an embolism a piece of tissue has broken off, floated downstream and blocked a vessel. This would give a patient ischemia. A thrombosis meant the blood flow to the vessel had slowed sufficiently that it clotted, and the clot acted as an obstruction rather than a piece of tissue broken off.

He stated an actual clot could begin at any point, and that physicians are concerned with propagation of the clot, whereby blood adjacent to the clot also clots and extends, making a long line of clot.

Dr. Westphal noted Dr. Locker's examination and initial Doppler evaluation on January 14 showed pulse at the popliteal level was very strong. He was of the opinion there was no femoral artery occlusion or popliteal artery occlusion when Dr. Locker examined Crenshaw on January

14. He also observed that Dr. Locker noted farther downstream the pulses were considerably weaker.

Dr. Westphal stated there were four symptoms of vascular insufficiency and occlusion of vessels: pain; paralyzed muscles; parathesia (tingling); pallor paleness to extremity.

He was of the opinion that on January 9 Crenshaw exhibited none of these symptoms. Yet on January 11 he was complaining of pain, and as time went on he developed parathesia. On the 14th his toes were blue, and upon being admitted to the hospital he evidenced parathesia, a paleness, pallor and a decrease in the pulses, as well as some degree of decreased muscle function.

Upon being asked why the arteries in both sides of his leg would be involved when there was an injury to his foot, Dr. Westphal replied this was the key to the whole situation, and why in his opinion Crenshaw lost his leg.

First, Crenshaw had a pre-existing atherosclerosis causing some decrease to the blood flow in his lower extremity. Then, he had an accident in which his foot was injured. Swelling developed which caused a further decrease in blood flow, and the whole foot swelled. All three arteries were affected. This swelling caused a decrease in blood flow locally to the foot. The blood flow could not take care of the waste product, and the injury could not heal. It might even have caused a thrombosis, or a clot to develop locally in those arteries at their very ends, and thus as a result of the low flow state and swelling, tissue died, and he developed gangrene. This led to amputation. (R.715)

He said it was very hard to tell how long direct trauma will take to give trouble. In a healthy individual it would take a complete blockage, by having a portion of the artery ripped away. In such a case a patient could develop problems immediately. In a low blood flow situation, however, it could take a while for a clot to develop and the patient have symptoms. The situation was variable.

DR. McPARLAND

Dr. McParland was the medical expert offered by Banker's Life. He testified his first opinion was given following examination of the pathology report, surgeon's report and some—but not all —of the medical reports. He did not have the benefit of any emergency room report or the admitting examinations on January 14, 1979.

Based on the surgeon's report of no blood supply distally to six inches below the knee, no evidence of trauma or injury to any part of the leg or foot, and the pathology report that Crenshaw had arteriosclerosis obliterans (hardening of arteries, narrowing and occlusion of the arterial bore), accelerated by his smoking two packs of cigarettes a day, Dr. McParland was of the opinion this disease alone caused the amputation.

As to trauma playing any part, he testified that the "blood stopped below the knee, according to the surgeon's report," and the trauma was to the foot. Therefore, according to Dr. McParland, any claim that an injury to the foot caused blood stoppage up below the knee was similar "to dropping a tree in a dry river bed and saying that two miles up the stream there's no water because it's the tree's fault."

He explained how the femoral artery in the groin and thigh becomes the popliteal artery, which in turn divides into three parts just below the knee: the peroneal, the posterior tibial and the anterior tibial, which extend and branch off into other arteries in the foot. The major trouble in arterial disease was where the arteries divided at the adductor magnus tendon and took a sharp turn.

An artery is very tough, he explained, like a garden hose, and that if the posterior tibial artery was damaged the anterior tibial artery took over.

He claimed the original records he examined showed no evidence of trauma: no redness, nc bruising, no bleeding,

as well as no swelling. The only diagnosis made initially by the treating physician was strain of the fourth metarsal ligament, which to Dr. McParland was insignificant.

Dr. McParland testified a review of Crenshaw's history, including that before the accident, confirmed his original opinion that the disease alone caused Crenshaw's problem and trauma had nothing to do with it.

An October 18, 1975, emergency room report showing a visit from Crenshaw to the hospital indicated pain in left calf with the cause undetermined. Further, Crenshaw had been hospitalized in 1978 for an abdominal obstruction, at which time an arterial pulse taken in his left leg showed only one-half normal, and there was no palpable pulse in the posterior tibial artery in his left leg.

Dr. McParland was of the opinion that if Crenshaw had been properly diagnosed orginally on January 9, 1979, with proper treatment the leg might have been saved, or at least amputation of only part of the foot would have been required.

Of main significance to Dr. McParland was the fact the surgeon's report indicated no bleeding when the tourniquet was removed. He said the tourniquet was only on for 13 minutes. In practice, after surgery the tourniquet is removed and the surgeon looks for bleeding blood vessels, and they must be sewed shut to avoid massive hemorrhaging. They are not tied off with a catgut. He said the flow was like a garden hose, and the report should indicate the "pulsatile blood flow" from the different arteries. The main reason for noting blood flow was so the next surgeon would know the exact condition of the blood vessel. It must be noted that Dr. McParland has never used tourniquets in his surgery practice.

In this particular case, according to the report of Dr. Westphal (as explained by Dr. McParland), Dr. Westphal took the tourniquet off and his search revealed no bleeders,

and he reported no, or virtually no, bleeding, which meant Crenshaw's vascular blood supply stopped above there. Crenshaw's popliteal artery was not pulsating, and therefore not bleeding.

Dr. McParland testified Crenshaw was seen by at least ten doctors and not one of them reported any evidence of injury such as a bruise, broken skin, scratch or redness. Dr. McParland testified that his diagnosis was supported by the fact that physicians using the Doppler ultrasound technique could only find one artery with measurable blood flow.

He testified the physicians determined where to amputate from the Doppler ultrasound showing that except for the peroneal artery there were only monophasic sounds.

On cross-examination Dr. McParland testified that a person with a severe case of arteriosclerosis affecting his lower extremities who dropped something on his foot was in no greater danger of developing problems from such injury than a healthy individual. This diseased condition made no difference.

He also testified a patient could cause an occluded artery by crossing his legs. Then he testified he did not believe a swelling of the foot would contribute to an occlusion. Rather, it was his view the occlusion in the upper part of the leg caused the edema.

Dr. McParland was of the opinion Crenshaw suffered no traumatic injury to his arteries. While acknowledging that trauma could cause a problem, he was of the opinion trauma played no part in Crenshaw's problem:

> Because if he had significant trauma to occlude the artery or to rupture or to lacerate it, then it would be one cause. But without any damage, with no evidence whatsoever of trauma—no redness, no swelling, no bruising, no discoloration, no fractured veins—a progressive disease going

> up his leg, I don't see . . . I couldn't correlate trauma to the foot with no blood supply below the knee. [R.985]

He reached the conclusion there was no swelling, bruising or redness because none of the reports mentioned it.

He was of the opinion Crenshaw's occlusion occurred in the popliteal artery, somewhere above where it divided into three arteries.

LAW

Was there a jury issue on punitive damages?

There are two significant cases which serve as guidelines on this question.

In *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d 239 (Miss. 1978), involving the wrongful refusal by an insurance carrier to pay a claim due under a credit life insurance policy, we repeated familiar criteria justifying award of punitive damages.[5]

Punitive damages are in addition to actual damages, and are in the nature of punishment for the wrongdoing of the defendant, and to set an example so as to deter others from similar behavior. *Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972), and cases cited.*

The basis in awarding such damages is to reward a plaintiff for public service in bringing the wrongdoer to account. Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So.2d 226 (1962), and cases cited.

Punitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong. *Seals v. St. Regis Paper Co.,* 236 So.2d 388 (Miss. 1970).

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[5] The holdings in this case were reiterated in the recent case of *Reserve Life Insurance Co. v. McGee,* 444 So.2d 803 (Miss. 1983)

In *Veal* we then stated.

> This case demonstrates the necessity of awarding punitive damages when an insurance company refuses to pay a legitimate claim, and bases its refusal to honor the claim on a reason clearly contrary to the express provisions of its own policy. If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely. We are of the opinion the refusal to pay the legitimate claim in this case was an intentional wrong and constituted an independent tort as comtemplated in *Progressive Casualty Insurance Co. v. Keys, supra.*
>
> Of course, if an insurance company had a legitimate reason or an arguable reason for failing to pay a claim, punitive damages will not lie, but in this case the defendant had no reason to contest the claim filed with it. We therefore hold that punitive damages were allowable.

354 So.2d at 248.

Richards v. Allstate Co., 693 F.2d 502 (5th Cir. 1982), involved a policy exclusion which this Court in *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767 (Miss. 1973), had previously held violated public policy and was unenforceable. In spite of our decision in *Lowery*, Allstate Insurance Company kept the exclusion in its standard policies sold in Mississippi. Allstate did, however,

inform its executive personnel to honor claims which would otherwise, under the exclusion, be denied. The lower echelon personnel (apparently not getting the message) denied the claim, based upon the exclusion. The Court of Appeals held retention of the invalid exclusion, failure to provide adequate procedures to prevent erroneous denials on this claim, plus denial of plaintiff's claim justified submitting the issue of punitive damages to the jury under Mississippi Supreme Court decisions.

In *Reserve Life Insurance Co. v. Magee,* 444 So.2d 803 (Miss. 1983), and the recent case of *Blue Cross & Blue Shield of Mississippi, Inc. v. Campbell,* No. 54,744 (on petition for rehearing decided April 10, 1985, and not yet reported), we held that the trial judge should first determine from all the facts of the case whether the issue of punitive damages should be submitted to the jury. In *Blue Cross* we stated, ". . . it is the function and responsibility of the trial court to determine whether the insurance carrier had a reasonably arguable basis, either in fact or in law, to deny the claim." We also stated in *Blue Cross* that any plaintiff asking for punitive damages had a heavy burden.

Did Bankers Life breach the contract in such a way as to amount to an intentional wrong, or in doing so was it so grossly negligent that the breach constituted an independent tort? *D.L. Fair Lumber Co. v. Weem,* 196 Miss. 201, 16 So.2d 770 (1944).

Was there an "intentional and unreasonable refusal" to pay a legitimate claim? Was there a *legitimate or an arguable reason* for failing to pay Crenshaw's claim? *Standard Life Insurance Co. v. Veal,* supra. Or, was there a "reasonably arguable basis, either in fact or in law, to deny the claim"? *Blue Cross,* supra.

These criteria in turn require an evaluation of the conduct of Bankers Life in handling this claim, as well as the

reason it gave for denying the claim prior to actual trial, and the reason given during the trial.

PRE-TRIAL

Bankers Life's handling of this claim prior to trial is a striking example of how an insurance claim should not be handled.

Crenshaw submitted his claim under the policy. The attending physician's form could not be filled in and completed by his attending physicians because of Air Force regulations. He did, however, sign authorization for Bankers Life to examine every medical record in existence pertaining to himself, and to interview any treating physician.

Bankers Life's own investigative procedures set forth what should have been done in such a case. *Indeed,* the special claim inquiry form transmitted to Equifax Service requests quite specific information:

> Investigation is not confined to points checked below. Cover fully, but in addition, use good judgment in following all leads.
>
> * * * * *
>
> Interview attending physician PERSONALLY and:
>
> Use confirmation of interview, Form 1425.
>
> Obtain photocopy of his records (if not available, explain).
>
> Emphasize following point(s) when personally interviewing physician:
>
> Question thoroughly regarding policy provisions checked above.
>
> Past health history . . .

Determine if injury is sole cause, independent of all other causes.

Exact cite of amputation [this handwritten in]

Obtain hospital record.

Photocopy entire record.

Exclude: nurses notes-temp charts.

EKG reports.

Signed statement on confirmation of interview.

Signed medical authorizations.

Description of circumstances surrounding accident.

Description of injuries.

Name and address of doctors and hospitals where confined.

The company did *none* of this. Only minimal information was procured from Equifax Service, following which no further information was requested by Bankers Life. There was no interview of Crenshaw, no interview of any of his doctors, and no request for medical records. Instead, relying on the three medical entries Crenshaw sent with his claim, his claim was denied. There is no dispute that these medical documents did not tell the complete story of Crenshaw's problems. It is also clear to this Court that what Crenshaw did send was sufficient to either justify payment of his claim, or at least require Bankers Life to make a full and thorough investigation, interview Crenshaw and his family, look at all of his medical records, and interview his doctors *before his claim was denied.*

Instead Bankers Life denied his claim, and gave as a reason therefor an exclusion under the policy which its

executive personnel knew was invalid under Mississippi law.

In *Peerless Insurance Co. v. Myers,* 192 So.2d 437 (Miss. 1966), a case actually read and cited by counsel for Bankers Life in his memo, we stated, P. 439:

> In cases involving insurance policies which allow recovery for "loss resulting directly and independently of all other causes from accidental bodily injury," recovery may be had where the accidental injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease, which in turn contributes to the disability or death for which recovery is sought, and where the accidental injury is a proximate cause of the resulting loss. [Citations omitted]

This well-established principle has been restated by this court and reaffirmed in the cases of *Zurich Insurance Co. v. Ruscoe,* 203 So.2d 305 (Miss. 1967); *Lincoln American Insurance Co. v. Ruscoe,* 210 So.2d 769 (Miss. 1960).

In its group insurance policy covering Crenshaw, Bankers Life had the following provision:

> Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person.

Despite the consistent holdings of this court that such a policy provision would not have prevented Crenshaw from recovery had the trauma to his foot played any part in the loss of his limb, Bankers Life at all times prior to trial denied coverage for this reason appears in all correspondence to Crenshaw or his representatives, and after suit was filed in the answer to the interrogatories.

In our cases we have spoken of "bad faith". This exclusion was particularly deceptive in this case. Common sense tells us there are many accidents which in and of themselves might cause no particular problems, but coupled with the physical condition of the victim can cause serious injury or disease. How many Bankers Life insured have there been who sustained some minor injury, and because of some underlying physical condition suffered serious problems, yet who accepted at face value the clear language of the policy? It would not be at all beyond the bound of reason for such injured insured to have read the initial rejection, examined his policy, and concluded that he was not covered. Such insured in all likelihood would not have known about our court decisions. Bankers Life, on the other hand, did know about them.

Bankers Life played the odds in this case and lost.

This case is really worse than *Allstate.* In *Allstate* the company personnel at least were notified not to deny coverage under an invalid policy exclusion. In this case Bankers Life took the consistent and deliberate choice to deny coverage for an invalid reason.

In their dealing with Crenshaw, Bankers Life personnel knew they were under a duty not to give an invalid reason for denying his claim. This duty was violated.

The Fifth Circuit Court of Appeals in two cases has interpreted our holding in *Veal* to mean that if the carrier offers no justifiable reason or arguable basis under Mississippi law for denying a valid claim, the issue of punitive damages must be submitted to the jury. *Black v. Fidelity & Guaranty Ins. Underwriters,* 582 F.2d 984, 990-991 (5th Cir. 1978); *Vogel v. American Warranty Home Services Corp.,* 695 F.2d 877 (5th Cir. 1983).

We think this is a sound interpretation of *Veal.* Surely, if a justifiable reason or an arguable basis for denying a claim exists, the insurance company is under a duty to

assert it; however, without that foundation the requisite intent or gross negligence necessary for the recovery of punitive damages may reasonably be inferred.

The reason given by Bankers Life for denying this claim up until actual trial was that Crenshaw had not shown that the amputation resulted from an injury "directly and independently of all other causes", and effected "solely through an accidental injury." Such a claim constitutes no arguable defense under the Mississippi law. Bankers Life subjected itself to punitive damages by consistently asserting this reason for denying Crenshaw's claim.

FAILURE OF DUTY

Aside from what Bankers Life consistently wrote Crenshaw and his representatives for a period of approximately two years, however, is the manifestly strange conduct of the executive personnel of Bankers Life, including its legal and medical departments.

Dr. McParland noted the absence of an emergency room report in all of his written memos, yet Bankers Life made no attempt to get a copy. The failure of Bankers Life to follow its own investigative procedures is blatant. By reviewing the complete medical records and interviewing the attending physicians and Crenshaw, Bankers Life could have answered any of the questions Dr. McParland raised prior to and at trial.

House counsel for Bankers Life testified he deemed the refusal to be purely a medical reason, not "legal". This is specious. He knew that reputable doctors were of the opinion that trauma did play a part in the eventual amputation, he was certainly aware of our decision in *Peerless*, and he should have known of authority from several jurisdictions would have affirmed an award to Crenshaw under the policy. See: *U.S. Casualty Co. v. Thrush*, 21 Ohio App. 129, Ohio L.Abs 714, 152 N.E. 796 (1926) (stubbed toe coupled with arteriosclerosis: amputation); *Fi-*

delity Reserve Ins. Co. v. English, 282 S.W.2d; 951 (Ark. 1956) (roofing tack foot wound coupled with arteriosclerosis: amputation); *Bumpus v. Eastern Greyhound Bus Corp.,* 291 N.Y. Supp.2d 540 (1968) (irritation of wet feet plus arteriosclerosis: amputation), in which appellate courts in three jurisdictions faced with similar questions affirmed awards of trial courts. Also, see Couch on Insurance, 2d ed., Vol. 10, § 41:86, P.146.

The executive personnel of Bankers Life, a nationwide health and accident insurance company which has been in business a number of years, unquestionably knew their duty under the law to properly investigate any claim. Proper investigation in this case meant the obtaining of all available medical information relevant to Crenshaw's claim. See generally authorities cited in Couch on Insurance 2d ed., Vol. 15A § 58.10, p. 277.

This was not a claim by a third party under a liability insurance policy, but a claim from a customer policy-holder of many years. Crenshaw was entitled to an honest, not disingenuous response to his claim.

With these basic premises in insurance law, the following questions are pertinent:

1. **Why was Dr. McParland never asked to make his determination based on the applicable legal standards?**

This record shows Dr. McParland never knew prior to trial what the legal criterion was in order for the claim to be due under the policy.

Dr. McParland should have been told: "Doctor, if trauma had anything to do with the loss of Crenshaw's leg, even though disease may have played a major part, under Mississippi law this is an accidental loss under the policy. Also, Doctor, we are under a duty to obtain all relevant medical information in order for you to make a determination based on all the facts. Therefore, do not make any medical eval-

uation until you are satisfied as a physician that you have all the information required to render a valid medical opinion."

Had Dr. McParland been told Bankers Life's responsibility under the law, it is inconceivable he would not have required the company to interview Crenshaw and his family and ascertain precisely how the accident occurred, what discoloration and swelling followed and where the pain was felt. Acting reasonably, Dr. McParland would have examined all medical records available to ferret out the relevant information. He noted discrepancies in the medical records furnished him, and an error as to the final diagnosis, which indicated a need to examine all records. Furthermore, his memos mentioned the missing Emergency Room report, this showing that he had some questions about the history of the accident. After examining all of the records, any further information needed was readily available by interviewing the attending physicians.

Furthermore, even without knowledge of the applicable *legal* standard, Dr. McParland should have recognized that under any standard of prudent medical practice it is foolhardy to attempt to make a diagnosis on incomplete medical records. Dr. McParland's in-house memos clearly indicate that he knew review of Crenshaw's emergency room record was essential to a trustworthy diagnosis; however, he never required Bankers Life to obtain a copy of it before rendering his opinion. The inter-office memos indicate the executive personnel engaged in a distinct, yet subtle nudging of McParland in the direction of an opinion favorable to it. They "used" their doctor and he quite willingly accommodated them in the affair. Dr. McParland ignored the gaps in information needed in order to make an accurate evaluation, picked the facts favorable to Bankers Life, and gave a medical opinion.[6]

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[6] Dr. McParland was quick to assert that at least ten doctors had seen Crenshaw, and none of them noted any trauma to his foot. Al-

2. Why wasn't Crenshaw told the reason Bankers Life was denying the claim?

As we have noted Bankers Life was under a duty to investigate Crenshaw's claim, and if the company's doctor was of the opinion trauma had nothing to do with amputation, to tell this to Crenshaw.

Bankers Life did neither. Its personnel did not make a proper investigation, and on incomplete information told Crenshaw his claim was denied. The reason they gave was not what their doctor had said, namely: trauma had nothing to do with the limb loss. Instead, they told Crenshaw he had to demonstrate that the accident, solely and independently of all other causes, caused the limb loss, a manifest impossibility in his case. Then, they told him if *he* had any further information to submit it, assuming no responsibility of checking the facts further themselves.

This conduct evidences a lack of confidence in their own doctor's opinion. For, not until trial began did Bankers Life ever attempt to claim that the actual reason for denying coverage was that the accident had nothing to do with the amputation.

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though this assertion is not supported by the record, the Court also notes that not one of these attending physicians reached the diagnosis Dr. McParland asserted. In fact, it is clear from the medical records and Dr. Westphal's testimony that Crenshaw's physicians were confronted with an injury to a foot that rapidly deteriorated up the leg, resulting in amputation. There is nothing in the medical records or Dr. Westphal's testimony to indicate that any of them considered the original problem to be an occlusion beginning around the knee.

These physicians were "on the scene," they examined Crenshaw, and Dr. McParland did not. Instead of interviewing these attending physicians, Bankers Life and Dr. McParland were content to deny the claim upon incomplete facts. In other words, they quit when they were ahead.

TRIAL DEFENSE

Was Bankers Life entitled to rely on Dr. McParland's opinion?

Bankers Life argues that Dr. McParland was a qualified and reputable doctor. Why should punitive damages be assessed when he testified disease alone caused the limb loss? Since there was a jury question on whether the accident had any causal relation to the amputation, based upon Dr. McParland's testimony, how can punitive damages be assessed?

This ignores the conduct of Bankers Life prior to trial and the reason it gave Crenshaw and his attorney for denying the claim. Lemersal, the house counsel, even advised Herzau to inform Crenshaw's lawyer Bankers Life must have proof that an injury caused the loss "directly and independently of all other causes."[7]

Crenshaw could argue with some cogency Bankers Life should have been estopped to assert this variant defense for the first time at trial.

Furthermore, the issue is not the defense which Bankers Life at trial finally settled upon to defend the suit, but the reason it gave Crenshaw for denying the claim. See: *Aetna Life & Casualty Co., Inc. v. Lavoies*, (Ala. 1985).

Moreover, it is not simply whether a jury question on liability is presented that is determinative, but whether Bankers Life knew the facts it asserted to make the jury issue were valid. Dr. McParland was not an independent physician in this case, but an employee and agent of Bankers Life. What he knew, or should have known, was imputed to Bankers Life.

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[7] Lemersal defended himself by testifying this was the policy language. When reminded this was contrary to Mississippi law, Lemersal replied Mississippi law had little, if any, bearing on whether the claim was "payable or deniable." (R.612)

An insurance company faced with two separate and distinct medical theories, each of which is supported by reputable physicians, and one of which would exclude liability, probably should not have punitive damages assessed if it asserted in court the theory favorable to its position. This would be true even though a jury rejected the company's position in the trial on actual damages.

It was not disinterested witnesses' particular version of the facts, or one medical theory arrived at by independent evaluation, which Bankers Life chose to rely on in this case. Instead, it was an opinion of its own employee on incomplete facts.

This leaves us with the inquiry as to whether Dr. McParland was a witness or an advocate in his medical opinion. The jury was entitled to examine the bona fides of Dr. McParland's testimony, just as they were entitled to scrutinize the other manifestly strange behavior of Bankers Life we have set out.

In any field of human endeavor judgments based on incomplete information are perilous. It is clear from this record that Dr. McParland both before and during trial freely expressed his opinion when he either did not have all the facts, or having them before him, chose to ignore those facts which either should or conceivably could have altered his opinion.

Three reasons were stressed by Dr. McParland for his assertion trauma had nothing to do with Crenshaw's limb loss bear scrutiny.

1. **No Sign of Trauma. Dr. McParland said the medical records showed no sign of redness, swelling, bruising, or breaking of skin. He said of the "ten" doctors who saw Crenshaw from his initial trip to the emergency room through his hospitalization, none noted any trauma. "He did not even break a vein, much less damage an artery."**

While the medical records vary on the initial accident causing the foot injury, Crenshaw informed Bankers Life from his first claim thenceforward that the cause of his foot injury was dropping a part of an automobile alternator on his foot. Bankers Life never challenged the accuracy of Crenshaw's version of the initial injury.

That dropping a metal object on an unprotected foot would not cause some swelling and some bruising of that extremity defies common experience. Dr. McParland was never instructed to, and never bothered to obtain a history from Crenshaw or his family, or to discuss the clinical observation of Crenshaw's foot with the emergency room doctors. He never considered the possibility that even if there had been no notation of swelling it might have resulted from a failure to record, rather than the fact that there was no swelling or bruising.

Yet, even the medical records dispute Dr. McParland.

When Crenshaw was seen by the resident, Dr. Scott, on January 9, 1979, he noted a "swollen, tender right midfoot."

On January 14 Drs. O'Neal and Locker noted swelling from the foot upward.

2. **A severely arteriosclerotic patient who suffers minor trauma to his foot is in no more danger of serious complications than a perfectly normal person.**

This particular view, of course, is totally at odds with the medical opinions expresses by both Drs. Hockaday and

Westphal. It is also inconsistent with Dr. McParland's own assertion on the witness stand that an occlusion can occur from as simple an act as crossing your legs.

Dr. McParland gave no medical authority for this conclusion, and some rather basic medical authorities state otherwise. *Textbook of Medicine,* by Cecil, Vol. I (16th ed. 1982), Chapter 36.1 "Peripheral Vascular Disease Due to Organic Arterial Obstruction," p. 318, states:

> Patients should protect limbs from cold or *trauma;* careful attention to keep the skin scrupulously clean, dry and soft is important. Even minor infection such as the dermatophytoses may produce problems. Toe nail trimming should be done regularly and with care.

See, also: Harrison's *Principles of Internal Medicine* (9th ed.), Chapter 253, "Vascular Diseases of the Extremities"; Robbins and Cotran, *Pathologic Basis of Disease* (2nd ed.), pp. 608-613. Indeed, in the August, 1979, issue of *The Journal of Trauma,* there is an article entitled, "Complete Disruption of Axillary Artery Caused by Severe Atherosclerosis and *Trivial Nonpenetrating Trauma.*'[Emphasis added]

Atherosclerosis by its very nature is a narrowing and hardening of blood vessel walls, as well as gradual clogging of the blood stream with fatty deposits. A view that a patient with a severe case of atherosclerosis is no more likely to have severe complications from minor trauma and swelling than a perfectly normal person defies common sense.[8]

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[8] Dr. McParland illustrated his medical opinion mentioning a log in a stream. Simple physics and hydraulics (if not the most rudimentary observation) also instruct us that, given the same pressure, a tube with its inner lining encrusted and with trash in it is more likely to stop up than it would if clear and clean.

3. The occlusion was above the knee.

According to Dr. McParland, even giving Crenshaw the benefit of the doubt that problems could have been caused by his injury, the occlusion which stopped the blood flow was not in the foot, but in the popliteal artery before it branched off into the anterior and posterior and the peroneal arteries, the three main arteries supplying the lower leg and foot. Dr. McParland's opinion was the occlusion was in the popliteal artery or higher in the femoral artery.

Why did he reach this conclusion? Two reasons: (1) the site of the amputation, and (2) the report of surgery, which showed no bleeding when the tourniquet was removed; hence there was a blockage of the artery above the amputation.

This conclusion is curious in view of the medical records and the testimony of Dr. Westphal, the attending surgeon.

As Dr. McParland noted, Crenshaw was seen by a number of physicians. The medical records reveal a chain of events beginning with a man reporting to the Emergency Room complaining of *an injury to his foot,* observations of progressive worsening of that injury and complications therefrom, efforts to abate or cure the problem, with the final progression up the lower leg to the critical state of gangrene and necessity of amputation. None of the records suggested Crenshaw's problem orginated with, or was solely a clot beginning above the amputation site. Rather, they relate directly to a problem beginning with a foot injury which rather rapidly deteriorated over a period of a few days.

As to the amputation site, Dr. Parland's first contention, Dr. Westphal testified this site was chosen for function and the fact the gangrenous condition had progressed far enough up the foot to indicate six inches below the knee was the safest place. There is nothing in the medical records or Dr. Westphal's testimony suggesting that prior to

surgery the decision to amputate below the knee was based upon a medical diagnosis or suspicion there was an occlusion at the kneeline or above.

Dr. Westphal testified no firm conclusion could be made about the blood vessels following the amputation because a tourniquet had cut off the blood flow for a significant period of time prior to surgery. Dr. McParland in his surgery never used tourniquets. Also to be remembered is this tourniquet was applied to a seriously atherosclerotic patient.

Demolishing Dr. McParland's contention that there was no flow below the amputation site, there is first the January 14 finding by Dr. Locker, the chief resident in vascular surgery, of a popliteal pulse which grew weaker downstream. Dr. Westphal testified the popliteal pulse found by Dr. Locker was "strong," according to the record. Second, and most conclusive, was Dr. Westphal's testimony, uncontradicted in the record, that on the day prior to surgery he obtained a blood pressure, albeit greatly weakened. Although discounted by Dr. McParland as "worthless," Dr. Westphal also testified a fluorescin dye injection on the day prior to surgery showed a line of demarcation of blood flow from the back of the foot to the back of the ankle.

Dr. McParland ignored Dr. Westphal's personal finding of a pulse on the day prior to surgery.[9]

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[9] Well, not quite. The circuit judge, apparently detecting the omission by Dr. McParland of this observation made by Dr. Westphal in reaching his opinion, questioned Dr. McParland in chambers out of the presence of the jury. There the circuit judge noted Dr. Westphal had found blood pressure the day prior to surgery. Dr. McParland's first response was this finding was not in the medical records. The court then asked Dr. McParland was he saying Dr. Westphal found no pulse. Dr. McParland replied—he was not saying Dr. Westphal found no flow, but if Crenshaw had had the kind of flow Dr. Westphal found, then he would not have

This Court takes no pleasure in any insurance company having to pay punitive damages. We affirm such an award with extreme reluctance. Yet an insurance has a duty to the insured to make a reasonably prompt investigation of all relevant facts. It has a further duty, after an adequate investigation and a realistic evaluation of the claim, to tell the insured, its customer, the plain truth. And, if the insurance company cannot give its insured a valid reason for denying the claim, it has a final duty to promptly honor it.

Conduct such as exemplified by Bankers Life in this case is harmful to the insured public. The company violated standards of conduct enunciated by this Court. It grossly violated its own in-house procedure for investigating a claim. Its executive personnel had to realize that a full and complete investigation posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had

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required surgery. (R.1029-1032)

This brings us full circle. Dr. McParland never saw Crenshaw. Dr. Westphal did. Unless Dr. Westphal was either mistaken or committed perjury, he detected a pulse. This was a fact Dr. Westphal personally observed (and not McParland's prerogative to deny), which sent up in smoke Dr. McParland's opinion there was no blood flow below the amputation site.

Did Dr. McParland then concede, in the face of an eyewitness account of blood flow, that he himself might be mistaken in his opinion that there was no flow below the site? No, he said, "If there had been that kind of flow, he would not require surgery."

Having repeatedly testified the blood flow ceased above the site of amputation, and this being his sole basis for concluding a problem *above* this area brought about the necessity of an amputation, when brought face-to-face with a testified *fact* to the contrary, did he abandon his *opinion* that he was possibly mistaken?

No, rather than having been mistaken in his opinion, he said if that had been true, there would have been no need for surgery. We can thus understand the circuit judge's intrigue with Dr. McParland's testimony.

absolutely nothing to do with the loss of limb. Yet they simply denied the claim for an invalid reason, especially deceptive in this case, because *on the surface* and to the uninitiated it appeared valid. Why did they not fully investigate so that their doctor would have all the facts? Was it *because* they thought the full facts would be *favorable* to them, or *unfavorable*? We must conclude the latter. They clearly recognized they were skirting a bad faith cause of action, but still played the odds.

Conduct of an insurance company not authorized by law which carries with it a potentiality of great harm to the insurance public is an outrage, and should be condemned. Punitive damages in such a case is an appropriate, and perhaps the only remedy. In this kind of case, it is the medicine most likely to cure the malady.

VOIR DIRE, TESTING QUALIFICATIONS OF EXPERT

In the voir dire inquiry of Dr. McParland's qualifications, he was asked if he knew Marlene Tobin, and replied, "Yes." Then, he was asked if he knew Lillian or John J. Hamparian, to which he responded he did not recall the name, but might know them. Then he was asked if they had not sued him. He replied he did not know about Hamparian, but there was a suit just instituted, ". . . she didn't sue me; she sued ten doctors . . . and I was not the doctor attending her at the time that that suit was instituted." (Vol VII, pp.955-956)

He was asked what the suit was about, how it was he was sued, and he replied Dr. Donald D. Dwyer was the attending physician. When asked her problem, he replied she was a 40-year-old woman who developed cancer and

had a lot of other problems. All the above testimony was elicited without objection.

Dr. McParland was then asked, "What about Marlene Tobin?" An objection to this question was sustained. Counsel then asked the doctor if he had been sued by anybody else, to which he responded, "Once." There was then an objection, which was overruled, and Dr. McParland replied that he had been one of the doctors sued in an anesthetic death that had occurred a number of years before, he could not recall when.

Bankers Life argues the above was improper voir dire but counsel has failed to favor us with any case in point.

Most of this testimony was elicited without objection, following which there was an objection to a question, which was sustained, but no motion for a mistrial. We are therefore confined to the question of whether reversible error was committed in the doctor's answer to the final question.

Dr. McParland was offered as an expert on the human anatomy. If there was anything about his past conduct which reflected his knowledge, clearly it was admissible. See: *Wood v. American Life Ins. and Trust Co.*, 7 How. 609 (Miss. 1843), P.631: ". . . when particular credit is concerned, particular inquiries are proper." The question is whether such past conduct was relevant to the inquiry.

In this case the questioning never proceeded to the point where it is clear, one way or another, that the one suit affected his knowledge in the capacity in which he was testifying.

In hindsight we can observe it would have been preferable for the inquiry concerning the litigation in which Dr. McParland found himself a party defendant to have been conducted in chambers in order to ascertain whether such suit in any way bore upon his professional qualification to express an opinion. No such request was made, however.

In inquiries of this nature, trial courts are given broad discretion, and there must be a showing of an abuse to warrant a reversal. See: 3A Wigmore, *Evidence* (Chadbourn Rev. 1970), Section 991, pp. 922-926; Jones *The Law of Evidence* (6th Ed.), Vol. 2, §14:30, p. 668. We cannot find an abuse of discretion on the part of the trial court, and even if there were, it was not reversible error. In these litigious times the mere fact some person has been sued hardly affects either his reputation or credibility.

AFFIRMED.

Date Circulated: May 23, 1985

PATTERSON, C.J., ROY NOBLE LEE, P.J., DAN LEE, SULLIVAN AND ANDERSON, JJ., CONCUR. ROBERTSON, J., WALKER, P.J., AND PRATHER, J., DISSENT.

SULLIVAN, JUSTICE, FOR THE COURT, PART II:

Bankers Life argues that the amount of damages awarded—$1,600,000—is grossly excessive and should be substantially reduced. The point is brought before us by Bankers Life's assignment that the trial judge erred when he denied Bankers Life's post-trial motion for a remittitur of punitive damages or, alternatively, a new trial on the amount of punitive damages.

This issue must be adjudged under the same process of adjudication as is applicable on any other assignment of error. This involves the familiar three-step process of identifying and articulating the applicable rules of law, resolution of all questions of evidentiary fact, and application of the law to the facts. See *Boardman v. United Services Automobile Association*, 470 So.2d 1024, 1029 (Miss. 1985)

With regard to punitive damages, our rules are necessarily general. Once it is established that punitive damages in some amount should be allowed, the quantum thereof is determined by reference to certain general factors which include:

(1) Such amount as is necessary for the punishment of the wrongdoing of the defendant and deterring defendant from similar conduct in the future, *Standard Life Co. of Indiana v. Veal,* 354 So.2d 239, 249 (Miss. 1977);

(2) Such amount as is reasonably necessary to make an example of the defendant so that others may be deterred from the commission of similar offenses. *Reserve Life Insurance Co. v. McGee,* 444 So.2d 803, 808 (Miss. 1983); *T.C.L., Inc. v. LaCoste,* 431 So.2d 918, 923 (Miss. 1983); *Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454, 460 (Miss. 1983); *Snowden v. Osborne,* 269 So.2d 858, 860 (Miss. 1972); and

(3) The pecuniary ability or financial worth of the defendant, *Collins v. Black,* 380 So.2d 241, 244 (Miss. 1980); *Allen v. Ritter,* 235 So.2d 253, 256 (Miss. 1970); *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d, 239, 249 (Miss. 1978); *Jones v. Carter,* 192 Miss. 603, 610, 7 So.2d 519 (1942).

Punitive damages are an important component of the remedial side of our law whose purpose is the protection of the customer. On these facts our law would seem to authorize a quantum of punitive damages to be that amount reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant. In this context, we note that Bankers Life reported to the Commission of Insurance in its 1980 report total assets in excess of $1,300,000,000, and net assets of approximately $294,000,000.

Our case law is to the effect that the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury. *See e.g., Commodore Corp. v. Bailey,* 393 So.2d 467, 471 (Miss. 1981);*Collins v. Black,* 380 So.2d 241, 244 (Miss. 1980); *Sandifer Oil Co. v. Dew,* 220 Miss. 609, 71 So.2d 752 (1954); *Teche Lines, Inc. v. Pope,* 175 Miss. 393, 166 So.2d 539 (1936). These same cases, frequently in the same sentence as has been used to commit sole discretion to determine the amount of punitive damages to the jury, use language expressing a view to the effect that the jury's verdict may be interfered with if it is found "arbitrary or unreasonable" or "against the overwhelming weight of the evidence". *Commodore Corp. v. Bailey,* 393 So.2d at 472. Other cases recognize that a jury's finding on amount of punitive damages may be disturbed "for exceptional causes". *Collins v. Black,* 380 So.2d at 244; *Snowden v. Osborne,* 269 So.2d 858, 861 (Miss. 1972); *Woodall v. Ross,* 317 So.2d 892, 896 (Miss. 1975).

Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. *Jesco, Inc. v. Shannon,* 451 So.2d 694, 705 (Miss. 1984); *Entex, Inc. v. McGuire,* 414 So.2d 437, 444 (Miss. 1982); *James Reeves Contractor, Inc. v. Chain,* 343 So.2d 1229, 1232 (Miss. 1977). This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court. *Schoppe v. Allied Chemicals Division,* 418 So.2d 833 (Miss. 1982), (contrast amount of verdict with amount of actual damage). We are not authorized to disturb a jury verdict regarding amount of damages because it "seems too high" or "seems too low". *Toyota Motor Co., Ltd. v. Sanford,* 375 So.2d 1036, 1037 (Miss. 1979).

Where this test is met, the trial judge is authorized generally to enter a remittitur or an additur as may be appropriate under the facts and circumstances of the par-

ticular case. [Miss. Code Ann. §11-1-55 (Supp. 1984)]. This authority to enter a remittitur or an additur exists where the nature of the damage award at issue is punitive or exemplary. See *Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239, 249 (Miss. 1977) (rule impliedly recognized). We hold that motions challenging the quantum of punitive damages and seeking either a remittitur or an additur are subject to the same rules as motions challenging the amount of damage awards generally. This means that on appeal we are reviewing a matter which is by its very nature committed to the sound discretion of the trial judge. See *Jesco, Inc. v. Whitehead*, 451 So.2d 706, 714-716 (Miss. 1984) (Robertson, J., concurring). What in essence we are dealing with is a motion for a remittitur or in the alternative for a new trial on the issues of damages only. Where the trial judge acts upon these matters, we reverse only if the trial judge abuses or exceeds his discretion. *Dorris v. Carr*, 330 So.2d 872, 874 (Miss. 1976).

While no hard and fast rule may be laid down with regard to the maximum amount of punitive damages which may be awarded in a given case, it is difficult to imagine that, consistent with the rules of law recited above, the judicial conscience could be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant. The record reflects that the net worth of Bankers Life in the year immediately preceding the trial was $294,000,000. The amount of punitive damages assessed by the jury was $1,600,000 or 0.54421% of the net worth of the company. However high that amount may "seem", it may not, consistent with our rules of law in the area, be said to shock the judicial conscience.

AFFIRMED.

PATTERSON, C.J., ROY NOBLE LEE, P.J., DAN LEE AND ANDERSON, JJ., CONCUR. HAWKINS, J. DISSENTS. ROBERTSON, J., WALKER, P.J., AND PRATHER, J., DISSENT.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW
DECIDED SEP 11, 1985

HAWKINS, JUSTICE, DISSENTING AS TO PART II:

This case gives me a special empathy with Moses. Having nursed the children of Israel for forth years in the wilderness, and against all expectations and insuperable odds, miraculously delivering them to Canaan's boundary, he was not permitted to go in with them. He went somewhere off in Moab and quietly expired. (Deuteronomy, 34)

While neither the travails of this case nor my puny talents remotely approach that historic figure, at least I do know how old Moses is bound to have felt that day.

In what I hope just as modest but not a terminable way I must part company now with my colleagues at the very end of this legal adventure. I simply cannot come to any conclusion but that a $1,600,000 punitive damages award was grossly excessive, and could have resulted only from prejudice or passion, or a misconception of the law, of the jury.

Of course, while those twelve citizens of Jackson County would not have been quite normal not to have had some dyspepsia or bile enlargement from Bankers Life's con-

duct, that very irascibility carried them to a grossly excessive award, in my view. Their reason was somewhat dissipated by their annoyance, thus the size of the verdict.

The scholarly opinion of the majority has given us a comprehensive and concise statement of punitive damages law. The decisions they cite I would cite as authority in reducing the award. Our difference comes in the application of these decisions, and our sense of proportion on the amount. I think the majority has considered only the net worth of Bankers Life.

Punitive damages decisions from this Court are not numerous, but clear principles are nonetheless discernible. They are that punitive damages are not a matter of right, but are granted as punishment, and to set an example to deter others who might otherwise be similarly inclined. The reason for the award, being neither a matter of compensation nor of right, is to reward the plaintiff for the public service rendered in successfully bringing the action. A jury cannot be directed to award any sum as punitive damages. They can only be authorized under proper instructions to consider the proprietary of some punitive damage award. Finally, the amount of the award is solely within the discretion of the jury, and will not be disturbed unless for "exceptional causes" or the amount is arbitrary or unreasonable. These principles may be found in the following cases: *Yazoo & Miss. Valley Railroad Co. v. Williams,* supra: *Hines v. Imperial Naval Stores,* 101 Miss. 802, 58 So. 650 (1912); *Yazoo & M.V.R. Co. v. May,* 104 Miss. 422, 671 So. 449, 450 91913); *Fowler Butane Gas Co. v. Varner,* 141 So.2d 226, 233 (1962).

These punitive damages principles were summarized in *Snowden v. Osborne,* supra, at 860-861:

> . . . They are granted in the nature of *punishment* for the wrongdoing of the defendant and as an *example* so that others may be deterred from the

> commission of similar offenses thereby in theory protecting the public [citations omitted]
>
> * * * * *
>
> The basis in awarding such damages to the injured party is that of *rewarding* an individual for public service in bringing the wrongdoer to account. [Emphasis added]

We also stated in that case that the amount was discretionary and should not be interfered with unless for "exceptional causes." See also, *Veal*, supra, at 247.

Three basic ingredients are therefore before the jury to be weighed, balanced and harmonized: punishment, public example and reward to the plaintiff. Each is essential, and it has never been suggested by any authority in this state than either one of these is more important than the other. The final verdict should be a fair balance of the three under all the circumstances of the case.

Then what part does the wealth of the defendant play? It is only relevant in determining an amount that constitutes meaningful punishment, and by no means the only relevant consideration under punishment, to which I will return. And, of course, it has nothing whatever to do with public example or reward to the plaintiff.

While I certainly agree with the majority that the net worth of Bankers Life makes it obvious that to constitute meaningful punishment, Bankers Life requires more monetary penalty than a filling station attendant, or a Piggly Wiggly store owner, I cannot agree with the concept the bigger they are the more we ought to zap them. The distinction may be somewhat subtle, But I believe this Court stated it in *Yazoo & M.V.R. Co. v. Williams*, supra, at 492:

> It is suggested in argument that the wealth of the wrongdoer may be shown in evidence, in or-

> der to permit the jury to consider that wealth in determining the amount of punitory damages to be awarded. This is true, but only upon the idea already advanced, that the jury *may gauge the amount of punishment necessary to be inflicted in order to deter a repetition of the offense; but it is in no proper sense intruduced as testimony to influence the verdict.* [Emphasis added]

In *Allen v. Ritter*, 235 So.2d 253, 256 (Miss. 1970); and *Collins v. Black*, supra, at 244, we plainly stated that pecuniary ability to respond might be considered by a jury, about it was not the only factor to be considered.

Under the principles announced in our decisions, the jury should be searching for an award which does the following: constitutes a meaningful punishment to the defendant, sets a public example, and rewards the plaintiff, and as above stated, these factors carry equal weight. There should be a harmonizing of the three factors, not some sum which shows only one factor has been considered (and it to influence the amount of the verdict), and the other two ignored.

If there is a remote possibility in the future of an inclination on the part of any individual to look mindly upon my tenure on this Court, I hope I am remembered for the awe and reverence I exemplified for the jury system.[1] My profound deference to the jury system, however, has not blinded me from what is obvious here: this jury paid no

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[1] Nothing a few examples, I have been in a decided minority in the following contentions: *Wilson v. State*, 395 So.2d 957, 961 (Miss. 1981), an accused should be entitled to a jury trial on whether he is a habitual offender; *Parker v. State*, 401 So.2d 1281, 1286 (Miss. 1981), an accused should never be deprived of having a jury decide his plea of self-defense; and *Hill v. State*, 432 So.2d 427, 542 (Miss. 1983), an accused in a capital murder case, and his jury, have a right to be told that regardless of the evidence, the jury has the power under our law to sentence him to life imprisonment rather than death.

more attention to the last two factors in reaching their verdict than to some Jackson County swamp rabbit.

Insofar as setting an example for others similarly inclined, a punitive damages award one-fifth the size of this would set off warning gongs and flashes in the headquarters of every insurance company in this country. Likewise, I certainly favor rewarding the plaintiff and his counsel for the service they have rendered this state in bring this action.[2] But, an award of $1,600,000?

And even as to a punishment, while the proof indicates Bankers Life can certainly respond to this amount in damages, does that mean it took anything approaching this sum to constitute meaningful punishment? To make them quit this practice? If a fraction of this sum would not teach this company a lesson that would remain forever silhouetted along the skyline of Bankers Life's memory, then it has no business in being in business.

In my view the wisdom of punitive damages, the rare instances when they should be awarded, and factors to consider in the amount, have evolved through two centuries of human experience. If we suddenly warp and distort these principles by ignoring some, and stretching others out of proportion, salutary punitive damages awards will not be simply rare, as they now are (and should be); they will be replaced. this case will be Exhibit A in the argument of all those who wish to do away with punitive damages altogether, reduce them to some meaningless penalty, or create an impossible standard to make any punitive damage award.

It is pertinent to not the original declaration filed January 11, 1980, asked for $400,000 punitive damages. It

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[2] I am quite aware plaintiff's counsel spent many hours on this case, but I doubt if he put in any more than some members of this Court have.

was amended November 27, 1981, four days before trial, to ask for $1,635,000 in punitive damages.

Also, the circuit judge refused a direct remittitur, but the significance of this refusal is diminished because he was erroneously of the view he had no authority to reduce the award. What he might have done had he been required to maturely reflect upon the matter we cannot know.

Of course, net worth is relevant on what constitutes *meaningful punishment.* In *Veal,* supra, on a punitive damage award of $50,000, we noted the company has worth $85 million. In *Reserve Life,* supra, on a punitive damage award of $152,000, we noted the company had a net worth of $102 million. Here, as the majority notes, Bankers Life had a net worth of $294 million.[3]

Yet considering just punishment, all attendant circumstances are proper considerations, not just net worth. Some of the other pertinent considerations are the degree of the offense, and whether there was malice, *Snowden,* supra, at 861; motive, *Will v. Hughes, 238 P.2d 478, 172 Kan. 45 (1951); Wrains v. Rose,* 175 So.2d 75 (Fla. 1965); the injury intended, *Booth v. Kirk,* 381 S.W.2d 312, 317 (Tenn. App. 1964); *Hildreth v. Hancock,* 41 N.E. 155, 156 Ill. 618 (1895); public sense of justice and propriety, *Shutz v. Morris,* 201 S.W.2d 144 (Tex. Civ. App. 1947).

Thus, even if the only factor to be considered was a meaningful, just punishment, I would think, just as important as the net worth of Bankers Life is the fact that as far as this record shows, this is the first time this company has been sued for punitive damages in this state, the plaintiff has never contended Bankers Life is more

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[3] In *Wagner v. Gibbs,* 80 Miss. 53 (1902), in affirming a punitive damage award of $2,000 against a defendant who had given a minister of the gospel a first-class whipping, the Court noted the defendant was worth $200,000.

than a first offender. Can we do nothing when upon its first offense the jury zaps the company $1,600,000?

We have stated that a punitive damage award should not be disturbed unless for exceptional causes," *Yazoo & M.V.R. Co. v. Williams,* supra, at 491; *Snowden,* supra, at 861; or it is "arbitrary or unreasonable." See *Commodore Corp. v. Bailey,* 393 So.2d 467 (Miss. 1981). This case falls squarely within both authorities. The award clearly ignored considering what amount would sufficiently constitute a public example and warning as well as a fair reward to the plaintiff. It grossly exceeds a sum necessary to constitute some meaningful punishment to Bankers Life in this case. While at first blush the majority's view might appear reasonable, this is precisely what it is, a cursory examination; it simply will not survive analysis and scrutiny.

The majority has also left me with the statement that the amount of the award must shock the "judicial" conscience, not the "actual" conscience. I lack the sophistication to discern the distinction between the two. I have enough trouble with the one I've got, and it would not rest comfortable if I remained silent on the amount of the award.

I would by proper remittitur reduce the amount to a award of $750,000 punitive damages. In so doing, we would still be showing deference to the trial jury.[4]

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[4] The majority correctly recognizes our authority to direct a remittitur in a punitive damages award. Nothing in Miss. Code Ann. § 11-1-55 restricts that section to actual damages. Furthermore, there is common law authority in both trial and appellate courts, to avoid the expense and delay of a new trial, to direct a remittitur. In *Gulf Atlantic Life,* supra, the Alabama Supreme Court remitted a $1,100,000 verdict to $100,000. *Dimick v. Schiedt,* supra; cases cited under 25A C.J.S. and *Curtis Publishing,* supra. Our only disagreement is in whether Miss. Code Ann. § 11-1-55 should be applied in this case.

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW

ROBERTSON, JUSTICE, DISSENTING:

I. Why In A Nutshell I Dissent

If in the course of a home auto repair project, one drops the alternator on one's big tow, no doubt that would hurt. A soft tissue injury, perhaps even a broken tow might result. Yet it seems a bit farfetched that such an accident, ten days later, would necessitate amputation of the right leg six inches below the knee. It is hardly reasonable that one seeking a monetary award based on such a causal connection should be required to prove it. Yet because it did just that and exercised a right I should have regarded as vested in it by our law, Bankers Life and Casualty Co. finds itself today assessed $1,600,000.00 in punitive damages with no apparent alternative except payment.

I dissent. I dissent, with the greatest respect for my colleagues in the majority and hope it not be thought disrespectful nor found inappropriate that I pointed point out the major errors found in the opinion of the Court.

To begin with, Bankers Life denied Lloyd Crenshaw's claim in reliance upon the opinion of its medical director, Dr. Nathaniel P. McParland, a specialist in vascular dis-

eases and surgery, with credentials and experience far in excess of that possessed by Plaintiff Crenshaw's doctors. Dr. McParland's opinion was that the physical findings and post-surgery pathology report reflected that the *sole* cause of the amputation was a pre-existing arteriosclerotic condition in Crenshaw's leg. This was Dr. McParland's opinion when he first reviewed the medical records and it remained his opinion at trial. Such a medical opinion ought be recognized as affording an insurer an arguable reason for refusal to pay Crenshaw's claim.

When he gave his original pre-suit opinion, Dr. McParland did not have all of the medical records (including the emergency room record which suggested an initial trauma). The majority implies that with sinister motives Bankers Life's claims department withheld pertinent medical records so that Dr. McParland would render an opinion favorable to the company's position. All of this is seen as much ado about nothing in that Dr. McParland made clear from the witness stand at trial that he had (some two weeks earlier) reviewed *all* of the medical records and that the "new" records served only to confirm his original opinion.

The majority complains that before suit was filed Bankers Life denied Crenshaw's claim on the authority of a policy provision, literal enforcement of which had been precluded by our prior decision in *Peerless Insurance Co. v. Myers,* 192 So.2d 437 (Miss.1966). The argument is so much judicial legerdemain. A careful reading of the three letters involved will reflect that in each Bankers Life denied the claim because it believed that the *sole* cause of the amputation was the pre-existing arteriosclerosis (which *everyone* agreed Crenshaw had) in the leg unexcited by trauma. This view of the ultimate facts derives from the opinion of Dr. McParland. Nothing in *Peerless* or in any other case decided by this Court precludes an insurer's denial of such a claim on such facts.

The opinion of the Court then steps wholly outside its adjudicatory function and degenerates into pure advocacy as it seeks to discredit the testimony of Dr. McParland. Significantly, the majority never hints that Dr. McParland was not "qualified" to appear as an expert witness or that his opinion testimony was not competent to go to the jury, nor that Crenshaw was entitled to a peremptory instruction in his favor on the liability feature of the underlying policy claim, notwithstanding Dr. McParland's testimony. Instead, the majority vigorously "cross-examins" Dr. McParland and then makes a jury argument that the good doctor's opinion is flawed. What the majority ignores is that, where the question procedurally is whether a j.n.o.v. should have been granted, there is no case known to our jurisprudence which sanctions this method of evaluating a key witness' testimony.

The majority opinion treats curiously our decision of only a few months ago in *Blue Cross and Blue Shield of Mississippi, Inc. v. Campbell,* 466 So.2d 833 (Miss.1984). There we held that in the "vast majority of cases" the insured's claim for punitive damages should not be submitted to the jury where the plaintiff insured is *not* entitled to a peremptory instruction on the liability feature of the underlying contract claim. 466 So.2d at 843. We reiterated that holding in *State Farm Fire & Casualty Co. v. Simpson,* ___ So.2d ___, ___ (Miss.No.54,606, dec. August 14, 1985). If applied to the case at bar, the *Blue Cross/State Farm* rule would require reversal. The majority, however, ignores this central thrust of *Blue Cross* and *State Farm,* never bothering to suggest why this case is not one of the "vast majority", and instead cites and quotes from a portion of the *Blue Cross* opinion not followed by the trial judge here, with respect to which no one (least of all the majority opinion) has suggested error, and having no discernible relevance to the adjudication of the case at bar.

Finally, the majority seems to hold that an award of punitive damages to a plaintiff insured need only be pred-

icated upon an authoritative finding that, objectively speaking, the insurer had no arguable reason for denial of the claim. In so doing the majority (a) modifies (albeit sub silentio) several prior decisions of this Court which impose a much heavier burden upon one who would recover punitive damages and (b) establishes a substantive rule by reference to which an insurer may become subject to an assessment of punitive damages wholly *different from* and *lesser than* that applicable in all other punitive damages cases, without offering any reason why assessment of punitive damages in bad faith refusal cases should be measured by standards other than those applicable generally.

In the end I would reverse and render so much of the judgment below as assesses punitive damages in favor of Lloyd Crenshaw and against Bankers Life. When our heretofore existing rules of law are applied to the case at bar, and when passion and prejudice are excised, I suggest with deference that reversal can be the only result. I would affirm the award of $20,000.00 on Crenshaw's underlying policy claim and, for reasons explained below, add thereto pre-judgment interest, reasonable attorneys fees and reasonable legal expenses.

II. Bankers Life Had An Arguable Reason For Its Refusal To Pay Crenshaw's Claim

A. Bankers Life Reasonably Relied On The Opinion Of Its Medical Director That The *Sole* Cause of Amputation Was Pre-Existing Arteriosclerosis

Bankers Life and Casualty Company did not rely merely upon the intuitive implausibility of Lloyd M. Crenshaw's claim when it denied that claim, pre-suit and at trial. Rather, Bankers Life consulted a highly qualified specialist[1]

[1] Dr. Nathaniel P. McParland of Chicago was the only medical witness who was a specialist in vascular surgery. He was the senior consulting surgeon at two hospitals. He was a member of the Board of American College of Surgeons, and had been a resident in vascular surgery at

in vascular diseases who—pre-trial and at trial—gave an unequivocal opinion that the *sole* cause of the amputation of Crenshaw's leg, as distinguished from the pain and soreness in his big toe, was a preexisting arteriosclerotic condition. This was no idle expert opinion. Every shred of medical evidence on the point reflected that the 61-year old Crenshaw had long suffered progressively worsening arteriosclerotic changes in the blood vessels of his right leg. Well prior to January 6, 1979, Crenshaw's years as a chain smoker had played a substantial part in producing the condition, the net effect of which was that the blood flow into Crenshaw's right leg had stopped below the knee. Because of the blood stoppage near the knee, any trauma to the big toe could not have borne a causal connection to the subsequent amputation.

Dr. McParland illustrated the point quite simply. The claim that trauma to Crenshaw's big toe caused the blood stoppage below the knee would be similar "to dropping a tree in a dry river bed and saying that two miles up the stream there is no water because it's the tree's fault". Dr. McParland was of the opinion that, if the falling alternator had been the culprit, at most only a part of the foot would have had to be amputated. Only the preexting severe arteriosclerotic conditions could have required the amputation which was in fact performed.

Confirming the intuitive view that dropping an alternator on one's big toe should not lead to the amputation of one's leg and broadening our perspective, Dr. McParland made clear that arteriosclerosis frequently leads to amputation *sans* trauma.

> Q. Doctor, is it probable, to a medical probability, that one could suffer a severe arterioscle-

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two hospitals in Illinois prior to entering into practice of general and vascular surgery in Chicago in 1960. His practice was predominately vascular.

> rosis condition and have to undergo limb amputation without the onset of trauma?
>
> A. That's the usual.

Generally speaking, only trauma of bone-crushing proportions (which Crenshaw's trauma clearly was not) leads to amputation[2]

Substantial evidence in the record supported Dr. McParland's opinion as to the cause of the amputation. The surgeon's report indicated no bleeding when the tourniquet was removed following the surgery. The pathology report of the amputated stump concluded

> Right foot and lower leg: severe arteriosclerosis of the arteries. Gangrenous necrosis.

This strongly supports Dr. McParland's ultimate opinion regarding causation.[3]

The proper context for understanding the issues tendered begins with acceptance of the notion that the unanimous opinion of the medical experts was that the

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[2] The implication of Dr. McParland's testimony, not even thinly disguised, is that, *if* immediately prior to January 6, 1979, Lloyd Crenshaw had sufficient blood flow (and hence pulse) in his lower right leg so that amputation was not imminent in the normal course, and *if* on January 6 Crenshaw experienced a trauma as he described at trial, and *if* ten days later his right leg was amputated six inches below the knee, then Crenshaw upon recovery from the amputation should have been investigating a likely claim for medical malpractice rather than suing Bankers Life for punitive damages. By this I do not wish to be understood as having concluded that the doctors who attended Crenshaw were guilty of malpractice, only that the logical extension of Dr. McParland's argument seems to my mind to bolster the arguableness of Bankers Life's only expressed reason for denial of Crenshaw's claim.

[3] Dr. McParland's testimony is discussed in much greater detail at pages 23-26 of the majority opinion and that discussion ned not be repeated here.

arteriosclerotic disease suffered by Crenshaw in his right leg was even on the view most favorable to Crenshaw, *an* underlying cause of the amputation. The only issue was whether this pre-existing disease was the *sole* cause of the amputation or whether it combined with accidental trauma to cause the amputation.

Of substantial importance and relevance is the testimony of Dr. Christopher T. Westphal, an Air Force general surgeon who performed the surgical amputation.[4] While he was of the opinion that the trauma was a precipitating cause of the amputation, together with the preexisting arteriosclerotic condition, Dr. Westphal conceded the plausibility of Dr. McParland's opinion. Employing terms taken from the majority opinion, Dr. Westphal said that Dr. McParland's thesis was "perfectly conceivable" (p.19), a "possibility" (p.20), and that

> one [such as Dr. McParland] could say it was a coincidence that he [Crenshaw] had trauma, and would have lost his extremity, anyway; . . . (p.20)
>
> Dr. Westphal never questioned that Crenshaw had a preexisting arteriosclersis causing a decrease to the blood flow in his right leg.[5] (p.22)

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[4] In the context of the legal point on which this case turns, to-wit: the "arguable reason" point, I regard it as important that, speaking qualitatively and quantitatively, the training, experience and other credentials of Dr. Westphal were substantially *less* than those of Dr. McParland. Dr. Westphal had graduated from medical school as recently as 1976 and had "been involved in internship and residence in general surgery at Keesler Medical Center". At the time he testified, he was not a member of any medical society other than the Air Force Society for clinical Surgeons. He was planning to take the written portion of his Board certification examination at the time he testified. He was the young, recently-graduated resident who did the amputation. Dr. Westphal had no experience in the sub-specialty of vascular diseases or vascular surgery.

[5] Dr. Westphal's testimony is summarized in full on pages 19-22 of the majority opinion and need not be repeated here.

> The third and final medical witness at trial was Dr. Hockaday, a general surgeon practicing in the Pascagoula area without substantial experience or expertise in vascular diseases. Dr. Hockaday was of the opinion that the amputation was caused by the combined operation of trauma and the preexisting arteriosclerosis.[6]

B. While The Verdict He Obtained Is Beyond Attack, Crenshaw Was Not Entitled To A Peremptory Instruction In His Favor On Liability Phase Of His Underlying Policy Claim

At the risk of stating the obvious, a point needs to be made here: With respect to the basic claim of Lloyd Crenshaw for benefits under the Bankers Life policy, there was a substantial dispute or difference of opinion among the medical experts as to whether Lloyd Crenshaw's dropping the alternator on his big toe bore a sufficient causal connection with the amputation so that policy benefits were payable. The jury resolved that dispute in Crenshaw's favor and, no doubt, because of the credible testimony of Drs. Westphal and Hockaday, the jury's determination in that regard is unassailable. *Paymaster Oil Mill Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975).

The converse is likewise true. If the jury had returned a verdict in favor of Bankers Life on the liability phase of the underlying contract claim, that verdict too would have been beyond attack. *Paymaster Oil Mill Co. v. Mitchell,* 319 So.2d 652, 657 (Miss.1975). To put the point another way, when at the conclusion of the evidence at trial Crenshaw requested a peremptory instruction on the liability feature of the underlying contract claim, that request was and necessarily had to be denied. Applying the *Pay-*

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[6] Dr. Hockaday's testimony is summarized at pages 17-19 of the majority opinion and need not be repeated here.

master Oil rule, we should surely have reversed had the trial judge granted any such peremptory instruction.

We see nothing in the majority opinion which questions this view of the evidence. Indeed, the majority's quite fair and evenhanded description of the expert testimony (pp.17-26) belies the possibility of any such peremptory instruction having been appropriate.

A related notion bears emphasis. Nothing said anywhere in this opinion proceeds upon or may be shown to depend upon acceptance of the proposition that Dr. McParland's opinion regarding the cause of Crenshaw's amputation was correct. Rather, the premises upon which this opinion rests are (a) that Dr. McParland was a qualified medical expert witness, see *Hall v. Hilbun,* 466 So.2d 856, 873-74 (Miss.1985); *House v. State,* 445 So.2d 815, 822 (Miss.1984), (b) that all necessary predicates to admissibility of his opinion regarding causation of the amputation were laid, (c) that Dr. McParland opined that the *sole* cause of the amputation of Crenshaw's leg was the arteriosclerotic disease process existing pre-January 6, 1979, and (d) this opinion was of sufficient force that, if the jury had found for Bankers Life on Crenshaw's underlying contract claim (assuming all other proof at trial remained the same), neither the trial judge nor this Court consistent with *Paymaster Oil* and progeny would have had authority to order entry in Crenshaw's favor of judgment notwithstanding the verdict. Until error be shown in one or more of these premises, it seems to my mind that we should reverse and render so much of the judgment as assesses punitive damages against Bankers Life.

A positive statement of my view of the matter having been stated, back to the negative, an exposure of and exposition upon the majority's major errors.

C. Bankers Life's Basis For Denial Of Crenshaw's Claim Remained The Same From First Denial Through Trial

The innuendos in the majority opinion to the contrary notwithstanding, the day of trial was by no means the first time when Bankers Life denied the underlying policy claim by reason of the proposition that the amputation was caused solely by the preexisting arteriosclerotic changes within Crenshaw's right leg. The record reflects that Dr. McParland rendered his first opinion to Bankers Life on June 19, 1979, and that the opinion he gave at that time was precisely the same as he gave at trial. From the outset Bankers Life relied on the opinion of Dr. McParland and denied the claim *solely* on that basis.

The first time Bankers Life communicated its decision to deny the claim to anyone acting on Crenshaw's behalf as the July 11, 1979 letter William Herzau wrote to Crenshaw's employer in Pascagoula.[7] That letter stated in pertinent part that

> according to the medical information we have, it appears that Mr. Crenshaw's limb loss was because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and necrosis. . . .

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[7] The majority opinion makes much of the fact that this claim denial letter includes a definition of injury which we had held unenforceable in *Peerless Insurance Co. v. Myers*, 192 So.2d 437 (Miss.1966). That the letter includes a reference to this definition is as true as it is irrelevant. The opinion furnished by Dr. McParland on June 19 was that the preexisting arteriosclerotic disease was the sole cause of the amputation. That opinion is paraphrased and summarized in the July 11, 1979 letter. There is nothing in either Dr. McParland's opinion or in the Herzau letter which indicates any view or understanding on the part of Bankers Life that any trauma in fact played any causal role leading to the amputation. Absent some indication in the letter that Bankers Life was of the view that the amputation was caused in combination by the arteriosclerotic changes and Crenshaw's dropping the alternator on his big toe, the reference to the *Peerless* rule is simply beside the point.

This was Bankers Life's first denial of the claim and the reason given was the same as that tendered at trial.

On April 8, 1980, Bankers Life wrote to Crenshaw again denying the claim. Again Bankers Life gave as its reason for denying the claim that

> according to all the medical information we have, it appears your limb loss was due to severe arteriosclerotic changes in the distal blood vessels and subsequent ischemia and necrosis. . . .

In this letter Bankers Life adds "This opinion was confirmed in the pathology report".[8]

A third pre-suit denial of the claim occurred on June 27, 1980, when Herzau wrote to Crenshaw's attorney and again gave as his reason that

> the operative report indicates the instructing arteriosclerotic area most likely is in the femoral or popliteal artery area although no mention of the femoral or popliteal pulses is noted.

At trial Bankers Life offered this same basis for its denial of Crenshaw's claim. See, for example, Mr. Lemersal at R.869:

Q. Why was Mr. Crenshaw's claim denied?

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[8] Again this opinion makes reference to the definition of injury mentioned in the previous footnote. Importantly, again nothing in the April 8, 1980 letter suggests in any way, shape, form or fashion that Bankers Life believed that there had been a trauma and was ignoring it and the *Peerless* rule. Indeed, there is touch of an inconsistency here in the majority opinion in that it complains at numerous points that Dr. McParland was not furnished with medical reports which would have reflected the fact of trauma. If that be true, Dr. McParland's pre-suit opinion could not have been infected by knowledge of trauma and, since Bankers Life was relying wholly on Dr. McParland's opinion, the denial of the claim could not in any way be predicated upon a *Peerless*-proscribed discounting of the trauma.

A. Because in the opinion of our medical director, the cause of the loss was a disease process.

Mr. Blessing at R.978:

Q. Now, what was the basis that you used in denying the claim? What did you tell Mrs. Doyle to tell Mr. Crenshaw?

A. According to the medical findings which our doctor reviewed, the cause of the amputation was *strictly* due to a disease process and not due to any injury.

Mr. Blessing at R.909:

Q. And the denial was based on Dr. McParland's report?

A. Yes, it was.

Mr. Herzau at R.925:

Q. If the alternator falling on the foot contributed to the injury . . . if the alternator was considered to be an injury and contributed to a problem, I would guess it should be paid. This is what I was questioning. This is what i was trying to determine.

Dr. McParland at R.978:

Q. Assuming there was trauma, from history, do you attribute any percentage of his loss to a trauma situation?

A. Absolutely none.

Q. And you conveyed your findings to the claims department at BAnkers Life?

A. I did.

In short, Bankers Life's pre-suit position remained consistent from July 11, 1979 forward. That position expressed in three separate letters to Crenshaw or his representatives was substantially indentical to the position

taken by Bankers Life at trial. It is disingenuous to suggest that Bankers Life ever relied on any basis for denying the claim other than the view that the sole cause of the amputation was the pre-existing arteriosclerotic condition in Crenshaw's leg.

D. The "Missing" Medical Records Merely Served To Confirm Dr. McParland's Opinion Regarding The Cause Of Amputation

The majority complains at length that Bankers Life failed to disclose to Dr. McParland all of the medical records in the case and particularly the emergency room report. This is much ado about nothing.

The majority opinion never makes quite clear just what it is that Dr. McParland would have learned from the medical records he did not have prior to trial that would have informed his opinion or would have been arguably inconsistent with his opinion. We can only presume that it is the fact of trauma, for it is true that at the outset Dr. McParland was proceeding on the assumption that there was no trauma. In this connection we note a sampling of the medical records regarding the history of Crenshaw's trauma and to begin with the emergency room report of January 9, 1979, states that Crenshaw "driving auto and hit pole with foot on brake". (p.3) On January 9, 1979, a clinical record states that Crenshaw "struck on ball right foot with rebounding clutch". (p.4) Then on January 14, 1979; a report stats that Crenshaw "injury to his right ankle in an auto accident". (p.7) Suffice it to say that these reports are not remarkable for their accuracy. Yet the majority says Dr. McParland should have had them.

Dr. McParland was cross-examined about this supposedly significant failure on the part of Bankers Life's claims personnel to furnish him all of the medical records. This exchange is revealing.

Q. Well, Doctor, the question I'm trying to get at is that you didn't get the full medical records of Lloyd Crenshaw until about two weeks ago; did you?

A. All those medical records . . . no, I didn't. Bul all they do is confirm the facts that *the man had no blood going down his leg.* It's just confirmation. It didn't add anything to the disease which was present, and the records are not going to change. What he had, he had. What he's got, he's got . . . and he's going to have it.

Q. And it's not significant to you at all the fact that Lloyd Crenshaw is sixty-one years of age, is an active person, worked up until the time of his amputation and then sometime thereafter as much as forty hours regularly every week, plays golf, goes dancing . . . that doesn't mean a thing.

A. No. I did the same operation on a professional dancer. It doesn't make much . . . you know, until its completely occluded, it doesn't make that much difference. You still have some blood supply.

Q. Doctor, would you agree with this? Is it possible to drop something on your foot to aid in occlusion? Is that possible?

A. It's possible if you break some bones and if you have a crushing injury.

Q. In other words, it would have to be a most crushing injury then.

A. Yes, it would. It's always associated with broken bones. *And if you don't have a pulse down there, it doesn't make any difference what you drop on it.* There's still no pulse, whether you drop in or don't drop it. *The*

surgeon said there was no blood going down there, and you can't change that.[9] (emphasis added).

We recognize, of course, that there is evidence in the record that may be seen in conflict with that which Dr. McParland relied upon. The majority notes evidence of a pulse below the amputation site. (Majority opinion, p.43, footnote 9). Coupled with the description given of the trauma experienced by Crenshaw on January 6, 1979, it also furnishes a basis for concluding that Crenshaw's attending physicians and surgeons may have performed an unnecessary amputation. In any event, for present purposes this merely furnished a basis for cross-examination of Dr. McParland and for argument to the jury that respecting Crenshaw's underlying policy claim, Dr. McParland's opinion should not be credited. Such evidence in no way undercuts the power of Dr. McParland's opinion to furnish Bankers Life with an arguable reason for its refusal to pay Crenshaw's claim.

The point is this. When Dr. McParland testified at trial, he had reviewed all of the medical records. His opinion remained what he had stated before: that the amputaiton was caused by the preexisting arteriosclerotic condition in Crenshaw's right foot. There is nothing in the fact of trauma, whether that consists of Crenshaw's dropping an alternator on his big toe or the variations thereof in the

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[9] In this exchange Dr. McParland explained once more his opinion that Crenshaw's amputation was due solely to arteriosclerosis. He noted in the operation report found in the initial medical records (P.Ex.7 at R.558) that there was "little free bleeding" found through the major arteries to the foot at the time of the amputation. Dr. McParland recognized that with little blood flow through these arteries at the point of the amputation there must have been an occlusion present somewhere near the beginning of the lower leg. Consequently an injury which allegedly occluded an artery in the foot would have had no effect since there would have been for all purposes no blood flow there anyway.

records recited above, which is necessarily inconsistent with what Dr. McParland stated. For this reason it is likewise of no great significance that these records were not furnished to Dr. McParland ab initio. While it would obviously be the better practice to furnish the physician who has to give an opinion in such matters all medical reports, one cannot on these facts say that this failure had anything to do with the opinion Dr. McParland originally reached or subsequently delivered by trial. What we have in a nutshell is an arguably sloppy practice which is of no practical or legal consequence here.

E. The Majority's "Discrediting" Of Dr. McParland Is Rank Advocacy

Of all of the errors in the majority opinion, the most egregious is that found at pages 39-43. It is here that the majority seeks to discredit Dr. McParland as an expert witness on behalf of Bankers Life. Various tactics are used. That Dr. McParland is a salaried employee of Bankers Life who derives approximately twenty percent of his income from work for Bankers Life is somehow seen as pernicious.[10] The majority goes on to cite the opinion of the other two doctors in the case as well as several medical texts to show that Dr. McParland was wrong. What becomes quickly apparent is that the majority opinion is a combination of a cross-examination of Dr. McParland and jury argument to the effect that the good doctor's opinion should not be credited. That such advocacy is inappropriate requires neither explanation nor citation of authority.

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[10] We cannot help noting the contrast between this case and our recent decision in *Blue Cross & Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984). In *Blue Cross*, the insurer originally denied the claim in reliance upon the opinion of a registered nurse. The Court held that this was just fine. Here, however, Bankers Life retains a physician, one of substantial credentials in the field of vascular diseases and relies upon the medical opinion of that physician. Bankers Life we convict of bad faith. This is irrational.

I have read pages 39-43 repeatedly searching for a suggestion, first, that Dr. McParland should never have been allowed to testify or, second, that after he testified his testimony should have been excluded or, ultimately, that Dr. McParland's testimony was so incredible that notwithstanding same Crenshaw was entitled to a peremptory instruction in his favor on the underlying contract claim. None of these suggestions are made. Absent such, the majority opinion discredits itself.

The majority's opinion treats as somehow significant that McParland was a paid part-time employee of Bankers Life, deriving approximately twenty pcent of his income from services rendered to Bankers Life. This was and is a ligitimate topic for cross-examination, for it amy be said to go to the witness' credibility. How the point is relevant on this appeal, however, escapes me. Suppose Dr. McParland had been situated the same but only ten percent of his income came from Bankers Life? Only five percent of his income? Only one percent of this income? Would we still find such evil in this arrangement?

Suppose on the other hand that Dr. McParland were not a salaried employee but rather functioned according to the classical arrangement labeled independent contractor? The majority seems to imply that this would make a difference. But suppose that Dr. McParland's work as an independent contractor in fact resulted in twenty percent *or more* of his income being derived from services renedered to Bankers Life. It is with our judicial knowledge that many physicians perform medical services for various business, commercial and industrial concerns on an independent contract basis. These physicians frequently are called to testify in a variety of types of proceedings. I have never heard of anyone suggesting that this Court should castigate the credibility of such a witness because of his relationship to the defendant company.

And I might add that it is within our knowledge that there are a number of physicians who testify regularly on behalf of injured persons who are plaintiffs in civil actions or claimants in workers' compensation proceedings. This too is and has always been recognized as a legitimate subject for cross-examination. Still I have never heard of a court castigating the credibility of any such plaintiff's physician. What the majority is doing in pages 39-43 is unprecedented in our jurisprudence. The undisguised advocacy there found and the absence of any citation to law or logic supporting such an approach to a party's expert witness should be sufficient to establish the error of the majority's approach.

F. Reliance Upon A Credible Medical Opinion Obtained In Good Faith As A Matter Of Law Furnishes An Insurer An Arguable Reason For Denial Of A Claim

Remembering that our core question is whether Bankers Life had an arguable reason for refusal to pay Crenshaw's claim, the majority's dispatch of Bankers Life's reliance upon Dr. McParland's opinion is further troublesome. I would have thought it a relatively uncontroversial proposition that, where the outcome determinative question is medical in nature, an insurer's reliance upon a physician's opinion would as a matter of law furnish an arguable reason for denial of a claim. I would have thought this particularly so against the backdrop of our decisions in *Blue Cross and Blue Shield of Mississippi, Inc. v. Campbell,* 466 So.2d 833 (Miss.1984) and *Consolidated American Life Insurance Co. v. Toche,* 410 So.2d 1303 (Miss.1982).

In *Blue Cross* we held as a matter of law that an insurer had an arguable reason for refusal to pay a hospitalization claim where the insurer relied on the opinion of a registered nurse. In *Consolidated American* it does not appear that the claims adjuster who rejected the claim relied on an expert medical opinion at all, in the context of which Justice Bowling in dissent chides the company for its fail-

ure to consult or seek an opinion of its full time medical director. 410 So.2d at 1307. Here Bankers Life consulted its medical director and relied upon his opinion. This generally ought to be enough.

Peel v. American Fidelity assurance Co., 680 F.2d 374 (5th Cir.1982) is quite important here. On analogous facts and applying Mississippi law, the Court of Appeals concluded

> that the findings and report of Dr. Attix [a physician retained by the insurer] that Mrs. Peel was not disabled to return to . . . [work] constitute ar arguable defense *as a matter of law.* Hence, the trial court *correctly refused to submit the issue of punitive damages to the jury.*

680 F.2d at 376. [emphasis added]

The *Peel* case is cited prominantly in Bankers Life's brief. The rule of law found in *Peel*—which is the Fifth Circuit's *Erie*-bound[11] articulation of Mississippi law—strongly supports Bankers Life's position on this appeal. Inexplicably *Peel* is not mentioned by the majority (although the majority shows great affection for other Fifth Circuit bad faith refusal cases applying Mississippi law).

In this state and elsewhere the law is and ought o be that reliance upon the opinion of a qualified expert physician or surgeon should as a matter of law furnish an insurer an arguable reason for refusal to pay a claim.[12] To be sure there must be limits on such a rule, *see Younan v. Equifax, Inc.*, 111 Cal.App.2d 498, 169 Cal.Rptr. 478, 487 (1980); *Little v. Stuyvesant Life Insurance Co.*, 67 Cal.App.2d 451, 136 Cal.Rptr.653, 659 (1977). Unless the Court holds that the medical expert was not qualified to

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[11] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1936).

[12] The majority seems to accept this proposition at page 38 and then inexplicably refuses to adhere to it.

give the opinion, or that his opinion was inadmissible because fraudulently rendered, the rule should hold. *See Georgia Farm Bureau Mutual Insurance Company v. Troupe,* 154 Ga.App. 108, 267 S.E.2d 834, 836 (1980); *Hermitage Health and Accident Insurance Co. v. Baggs,* 115 Ga.App. 138, 154 S.E.2d 270, 273 (1967).

In the case at bar Bankers Life sought the opinion of a physician highly qualified in the field of vascular diseases and surgery. That opinion was that the *sole* cause of the amputation of Lloyd Crenshaw's right leg was its preexisting arteriosclerotic condition. Bankers Life relied on this opinion. With respect, there is no dispassionate basis upon which one might say this was anything other than a bona fide opinion entitled to credit. In my view such a medical opinion as a matter of law furnished Bankers Life an arguable reason for refusal to pay Crenshaw's claim. To do otherwise requires that we set ourselves up as medical experts (which is precisely what the majority ultimately does). The potential for mischief in such an approach is to my mind great and obvious.

G. Bankers Life Never Relied On An Unenforceable Policy Provision Provision As A Basis For Its Denial Of Crenshaw's Claim

An additional red herring needs to be dispatched. The majority claims that the basis for Bankers Life's denial of Crenshaw's claim was its alleged literal reading of a clause in the policy we held in *Peerless Insurance Co. v. Myers,* 192 So.2d 437 (Miss.1966) unenforceable literally. This language is in the form of a policy definition of the term "injury" as meaning

> bodily injury causing the loss . . . directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person.

In *Peerless* we held that, notwithstanding such a clause,

> recovery may be had where the accidental injury aggravates, renders active, or sets in motion a latent or dormant pre-existing physical condition or disease, which in turn contributes to the disability or death for which recovery is sought . . . .

192 So.2d at 439.

True, Bankers Life quoted the language of the clause in its claim denial letters of July 11, 1979, and April 8, 1980. Those letters coupled with the August 18, 1980 letter to Crenshaw's attorney make clear that Bankers Life is relying ultimately upon the medical opinion of Dr. McParland that the *sole* cause of the amputation was the preexisting arteriosclerosis. The majority obfuscates this feature of the claim denial letters and insists (at page 31 and elsewhere) that Bankers Life was relying on the *Peerless*-invalidated definition of injury. I cannot find these facts in any of Bankers Life's claim denial letters or anywhere else in the record.

Having misfound the facts, the majority proceeds to find false comfort in the Fifth Circuit's decision in *Richards v. Allstate Insurance Company*, 693 F.2d 502 (5th Cir.1982). In *Richards*, Allstate denied a claim on the basis of a policy exclusion which this Court had previously held unenforceable in *Lowery v. State Farm Mutual Automobile Insurance Co.*, 285 So.2d 767 (Miss.1973). Rashly, the majority says "This case is really worse than *Allstate*" (p.32). With respect, I would suggest that examination of the *Richards* case and this case and a careful comparison of the two reveals the majority's analogy to be so much wishful thinking.

The basis for the superficial similarity between this case and *Allstate* is that Bankers Life refers in its denial letters to a definition of injury we held unenforceable in *Peerless*. What the majority overlooks is that the denial of this claim, both pre-trial and at trial, was not based on the unenforceable policy provision but was in fact made on

the premise that the *sole* cause of the amputation was the preexisting arteriosclerotic condition in Crenshaw's right leg. I have been able to find nothing in the record to indicate that Bankers Life accepted the proposition that Crenshaw had sustained a trauma which aggravated preexisting arteriosclerotic condition and then, ignoring *Peerless*, denied the claim by the literal invoking of the policy language.

Even if it may be said that Bankers Life ignored *Peerless* in the same sense that Allstate ignored *Lowery v. State Farm*, we have here a wholly independent basis for the denial of the claim—Dr. McParland's opinion that there was no cause of the amputation other than the preexisting arteriosclerotic changes. In *Richards v. Allstate* there was no other basis for denial of the claim other than the exclusionary clause invalidated in *Lowery v. State Farm*.

III. The Blue Cross Misconnection

The majority's treatment of our recent decision in *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss.1984) is troublesome on several fronts, one of which has been mentioned. The majority's primary reference to *Blue Cross* regards the matter of who decides whether "an arguable reason" exists, 466 So.2d at 842, the problem with which is that the premise stated refers neither to what the trial judge did in this case, nor what he should have done, and simply plays no discernable role in the overall structure of the majority opinion and its view of how bad faith refusal cases should be handled. Conversely, the majority completely ignores the principal passage from *Blue Cross* I would have thought relevant here—that ordinarily, where the insurer has a reason for denying a claim sufficient that it survives the plaintiff insured's motion for a directed verdict or peremptory instruction on the liability feature of the underlying contract claim, the insurer should thereupon become insulated from an award of punitive damages. *Blue Cross*, 466 So.2d at

842-43. Because of their importance, I will discuss these two points with some care.

A. Whether An Insurer Has An Arguable Reason For Failure To Pay With Reasonable Promptness Is A Question Of Ultimate Fact Determined By The Jury And Subject To The Rule Of Paymaster Oil–Although No Issue Here Turns On The Point

In *Blue Cross* the majority states

> When the presentation of all evidence has been completed by both sides, it is the function and responsibility of the trial court to determine whether the insurance carrier has a reasonably arguable basis, either in fact or in law, to deny the claim.

466 So.2d at 842.

This proposition is repeated at page 28 of the majority opinion in the case at bar.[13] Such repetition adds only to the authority of the proposition, not its logic.

Whether an insurer has an arguable reason for refusal to pay a claim is inherently and predominantly a question of fact. The question is a matter of consequence on that day and in that case. It involves an inquiry which by and large will be of no concern or interest outside the context of the particular action. It is a "why did you act or fail to act" inquiry directed to one of the parties. It is even a question of fact when the insurer asserts a purely "legal"

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[13] The notion at issue may have been derived from Freeland, et fil., *BAd Faith Litigation: A Practical Analysis*, 53 Miss.L.J. 237, 262-70 (1983). In my view, whether an insurer has an arguable reason for its refusal to pay a claim with reasonable promptness is no more a question for the trial judge—as distinguished from the jury—than whether a particular course of conduct constitutes negligence. Both arguable reason and negligence inquiries involved questions of ultimate fact. Stated otherwise, each involves a mixed question of law and fact. Neither may be taken from the jury except with scrupulous regard for the strictures of *Paymaster Oil* and progeny.

defense, for whether that legal defense is valid is subject to dispute and trial the same as any other fact question. *See Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 854-55 (Miss.1984)(Robertson, J., Concurring). I had thought this approach incorporated into our law by virtue of *State Farm Fire & Casualty Co. v. Simpson*, ___So.2d ___, ___(Miss.No. 54,606, decided August 14, 1985), the ink with respect to which is not even dry.

All pure questions of fact and all questions having substantial factual components triable by a jury at common law may of right be subject to jury determinations in civil actions in this state. *See City of Jackson v. Locklear*, 431 So.2d 475, 478 (Miss.1983), construing Miss.Const. Art. 3, §31 (1890). The *raison d'etre* of *Paymaster Oil* and progeny is to assure that the constitutional right to trial by jury remains secure.

Seen in this light it is the constitutional right of each litigant, if he so elects, to have a *jury*, not the trial judge, determine whether the insurance carrier has an arguable reason for refusal to pay a claim, an inquiry which will always be essentially one of fact even where the dispute is whether a legal defense may be recognized. The trial judge's authority in such matters is severely restricted and constitutionally so. Those limitations have been repeatedly articulated in *Paymaster Oil* and progeny, the most recent of which is *State Farm Fire & Casualty Co. v. Simpson, supra*, where we cited *Paymaster Oil* and held that

> the question, whether an insurer has an arguable reason to deny the claim is to be passed upon. . . . under the same rules as are applicable in any other jury trial.

___So.2d at ___.

The correct statement of the constitutionally mandated rule is that it is the primary function and responsibility of the jury, not the trial judge, to determine whether the

insurance carrier has an arguable reason for refusal to pay a claim. The *Blue Cross* statement quoted here by the majority is thus seen wrong as matter of elementary legal reasoning. In the context of this case, this is just the beginning of the statement's inadequacies.

The record in the case at bar reflects that the trial judge *did not* "determine whether the insurance carrier has a reasonably arguable basis, either in fact or in law, to deny the claim" although he was requested to do so. The trial judge submitted the question to the jury.

As explained above—and respecting the teachings of *Paymaster Oil*—it is my view that the evidence is without contradiction that Bankers Life had an arguable reason for denial of the Crenshaw claim, and, that there was otherwise no jury issue on punitive damages. Assuming arguendo that I be wrong on the point, the arguable reason issue goes to the jury not the trial judge for decision. This is the rule the trial judge followed here, and I do not perceive the majority to reverse, thought fervently I would wish it to do so on other grounds.

I would submit that here and elsewhere I have demonstrated that determining the arguable reason issue (except with strict fidelity to *Paymaster Oil*) is not something trial judges do or ought to do in bad faith refusal cases. In the case at bar, the trial judge did not determine the arguable reason issue. The majority opinion certainly doesn't reverse him for his refusal to do so. All of this gives me hope that the majority's fascination with this rationally unsound, legally invalid and practicably unused approach to determining the fact question of whether the insurer has an arguable reason for denial of a claim will soon pass.

E. Faithful Application of *Blue Cross* Requires Reversal Here Or At Least A Candid Explanation Why Not

The majority's second sin regarding *Blue Cross* is one of omission. It is seen in the context of the trial judge's

refusal to grant Crenshaw's request for a peremptory instruction on the liability feature of the underlying contract claim made at the close of all of the evidence. The effect of this ruling was a determination by the trial judge that reasonable minds could differ on the question of whether Crenshaw's pre-existing arteriosclerosis was the sole cause of the amputation of his leg.

In *Blue Cross* this Court said:

> It can be argued with considerable persuasion that unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and, therefore, the carrier should never be subjected to the possibility of punitive damages based upon "bad faith."
>
> There is compelling logic behind this argument and this would certainly appear to be true in the vast majority of cases. This criterion should ordinarily determine the answer to the question.

466 So.2d at 843.

We have applied this approach in *State Farm Fire & Casualty Co. v. Simpson*, ___So.2d ___, ___(Miss.1985) to reverse a substantial punitive damages judgment against an insurer. This view, which I regard as sound and which (until today) I had thought firmly imbedded in our law, has great relevance here, for on this view, when the trial judge (correctly) refused the peremptory instruction in Crenshaw's favor on the liability phase of his contract claim, he necessarily pretermitted Crenshaw's claim for punitive damages.

To be sure, this approach does not fit every case, as I have explained elsewhere.[14] But when the *Blue Cross*

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[14] *Blue Cross and Blue Shield of Mississippi, Inc. v. Campbell*, 466 So.2d 633, 652 (Miss.1964) (Robertson, J., Concurring).

majority states such a premise on April 10, 1985 and suggests that it will be found applicable "in the vast majority of cases", 466 So.2d at 843, and when the *Blue Cross* language is copied verbatim and given outcome determinative significance in *State Farm* on August 14, 1985, something more than silence is called for in the opinion of today's majority, particularly when this case seems so clearly one of that "vast majority" to which the *Blue Cross/State FArm* approach should apply. Yet the majority opinion here, however, doesn't even mention what I take to be one of the central premises of the *Blue Cross* majority opinion and the *State Farm* unanimous opinion.

Generally speaking, if the insurer has at trial denied liability on the policy—asserted lack of coverage, an affirmative defense, or whatever—and if the state of the evidence after all parties have rested is such that under our familiar rules the factual issue may not be taken from the jury, *see, e.g., Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 657 (Miss.1975), then the plaintiff insured is not entitled to a peremptory instruction on the underlying policy claim and as a matter of law the insurance company becomes insulated from a bad faith refusal claim.

If the evidence, to-wit: a conflict in medical opinions regarding the cause of the amputation, is such that a reasonable *jury* could find facts which would undergird a successful policy defense, the same evidence surely would justify a reasonable *insurance company* in so concluding, excepting only those cases where these is also a jury issue whether the medical opinion is a sham or the product of fraud or "lying" (at exception not present here). *Standard Life Insurance Co. of Indiana v. Veal*, 354 So.2d 239 (Miss.1977), holds that:

> If an insurance company has a legitimate reason or an arguable reason for failing to pay a claim, punitive damages will not lie, . . .

354 So.2d at 248.

An arguable reason is one in support of which there is some credible evidence. There may well be evidence to the contrary. A person is said to have an arguable reason for acting if there is some credible evidence that supports the conclusions on the basis of which he acts. And when we say this, we are in essence articulating in an extra-judicial context our familiar rules regarding what proof is necessary to create a jury question. *See, e.g., Stubblefield v. Jesee, Inc.*, 464 So.2d 47, 54 (Miss.1984); *City of Jackson v. Locklear*, 431 So.2d 457, 478 (Miss.1983); *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 657 (Miss.1975).

If there is a jury issue on the underlying policy question, that is, if the plaintiff insured is not entitled to a peremptory instruction on the liability feature of his underlying policy claim, then it follows generally that the insurance company has an arguable reason for failing to pay the claim.[15] This is the central teaching of *Blue Cross*, 466 So.2d at 843.

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[15] Courts in other jurisdictions have recognized that where there is a factual issue on the liability feature of the insured's policy claim, an award of punitive damages or a statutory penalty is not proper as a matter of law. The Supreme Court of Iowa discussed this point as follows:

> The evidence adduced by defendants in support of their defense of misrepresentation clearly made plaintiff's contract claim 'fairly debatable,' and trial court must have determined this was so when it denied plaintiff's motion for a directed verdict on that claim. *Plaintiff thus failed as a matter of law to prove what the adopting jurisdictions consider as essential element of the first-party bad faith tort, i.e., the absence of a reasonable basis for denying contract benefits.* Accordingly, the jury should not have been instructed on that tort, and plaintiff's claim for punitive damages should not

This approach is undergirded by and traceable to *Veal* where we stated

> in our view of the case the plaintiff was entitled to a peremptory instruction directing the jury to find for him for the face amount of the policy, 354 So.2d at 246,

and only then affirmed an award of punitive damages. This is what I read *Blue Cross* as accepting as the approach to be applied "in the vast majority of cases", 466 So.2d at 843.

Without doubt the above formulation will not work in every case. Where the insurer's representatives lie or their defense is otherwise fraudulently conceived, the denial of the insured's request for a peremptory instruction on the liability claim should not preclude submission to the jury of the bad faith refusal claim. *Blue Cross and Blue Shield of Mississippi v. Campbell*, 466 So.2d E33, 852

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have been submitted to the jury.

Higgins v. Blue Cross, 319 N.W.2d 232, 236 (1982)(emphasis added). In *Gulf Life Ins. Co. v. Wilson*, 181 S.E.2d 914 (Ga.1971), the Courts said:

> Since there was a jury issue as to whether Mr. Wilson was mentally competent to execute the release, and a verdict was authorized for either plaintiff or defendant on that issue, it cannot be said that the defense of Gulf Life was frivolous or unfounded, that it did not have a reasonable ground for contesting the claim. No bad faith appears in making the defense, and the award of penalty and attorney's fees was unauthorized. . . . *If the evidence authorized a verdict for the defendant, or to put it another way, if the verdict could have gone for either party it does not authorize a finding of bad faith.* 18 S.E.2d at 916-17. (emphasis added, citations omitted).

See also National Savings Life Insurance Company v. Dutton, 419 So.2d 1357, 1362 (Ala.1982); *Welch v. Western Cas. & Sur. Co.*, 567 S.W.2d 743, 748 (Mo.1976) and my concurring opinions in *Reserve Life Insurance Company v. McGee*, 444 So.2d 803, 814-19 (Miss.1983) and *BlueCross and Blue Shield of Mississippi v. Campbell*, 466 So.2d 833, 851-52 (Miss.1985).

(Miss.1984)(Robertson, J., concurring). It may be that the majority here regards Bankers Life's defense as a lie or otherwise the product of fraud, and if it does I wish it would forthrightly so state, for in that event only this case would be wrong. As the opinion now stands, and when it is compared with the portion of *Blue Cross*and *State Farm* here under discussion, the whole fabric of our law of bad faith refusal cases is seen rent with confusion and inconsistency.

For the reasons already explained, when this central thrust of *Blue Cross* and *State Farm* is applied to the case at bar, the judgment for punitive damages against Bankers Life can only be reversed and rendered. When the majority here doesn't even try to distinguish *Blue Cross* or *State Farm* or show how this case fits within some exception to the rule of those cases, but merely proceeds as though this central premise did not exist in our law, the injustice of our affirmance of the $1,600,000.00 punitive damages judgment becomes even more apparent.

IV. The Majority Affirms An Assessment Of Punitive Damages In This Bad Faith Refusal Case By Reference To A Standard Without Precedent In This State And Different From And Lesser Than The Standard Applicable In All Other Punitive Damages Cases

My final complaint is that the majority en route to affirmance has wholly departed from our general substantive rules regarding the assessment of punitive damages. Indeed, the majority has carved out bad faith refusal cases and held that in such cases punitive damages may be assessed upon a lesser showing than we require generally. I would hold that the substantive rule breach of which may subject a party to an assessment of punitive damages is the same in bad faith refusal cases as in any others.

The majority opinion, at pages 28-33 and particularly on page 33, appears to hold that punitive damages may be

assessed solely upon a showing that the insurer denied the claim without an arguable reason therfore. All of our bad faith refusal cases—from *Standard Live v. Veal* forward—until today proceeded under the premise that punitive damages could not be assessed against an insurer unless there had been a violation of our general rule that proof of gross, reckless or maliciously intentional conduct must be shown. I read the majority as suggesting that denying a claim or defending a lawsuit without an arguable basis therefor will without more subject one to punitive damages.[16]

The confusion on this point—of which the majority here is by no means the first manifestation—appears to emanate from that most overworked sentence from *Standard Life v. Veal*, which in pertinent part reads:

> Of course, if an insurance company has . . . an arguable reason for failing to pay a claim, punitive damages will not lie, ...

354 So.2d at 248.
This statement makes sense and has appropriately become the bedrock of much of our law in bad faith refusal cases.

The problem is that *the converse is not necessarily so.* That the *presence* of an arguable reason precludes assessment of punitive damages does not mean that the absence of an arguable reason requires their award. Yet this is precisely the trap into which the majority here—and no doubt others—have fallen, for the majority seems to proceed on the notion that all Crenshaw had to show to recover punitive damages was the *absence* of an arguable reason for Bankers Life's denial of his claim (see particularly page 33 of majority opinion).

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[16] If this is the rule, a lot of litigants and their lawyers are in big trouble. And what about the converse? If a plaintiff presses a claim without an arguable basis for believing it viable, is the plaintiff subject to an assessment of punitive damages?

I submit that more than the absence of an arguable reason must be shown before punitive damages are recoverable, much more, and that none of our cases prior to today holds to the contrary. The three bad faith refusal cases in which we have heretofore affirmed assessments of punitive damages all proceed under our general rule regarding punitive damages, that such damages are assessable only where the insurer has been guilty of some willful or malicious wrong or the gross or reckless disregard for the rights of others. *Standard Life Insurance Company of Indiana v. Veal*, 354 So.2d at 247; *Travelers Indemnity Co. v. Wetherbee*, 368 So.2d 829, 835 (Miss.1979), and *Reserve Life Insurance Company v. McGee*, 444 So.2d 803, 808-09 (Miss.1983). Where one or more of these labels may fairly be said to describe the conduct of the insurer, no doubt that insurer will have denied the claim without an arguable reason, but *again the converse is not necessarily so.*

The point is driven home by a recognition of the various circumstances in which, objectively speaking, an insurer may have no arguable reason for refusal to pay a claim but may nevertheless not be lawfully subject to an assessment of punitive damages. Where the failure to pay the claim is the result of a "clerical error or honest mistake", *State Farm Fire & Casualty Co. v. Simpson, supra; Consolidated American Life Insurance Co. v. Toche*, 410 So.2d 1303, 1306 (Miss.1982), punitive damages do not lie though objectively speaking the insurer has no arguable reason for failure to honor a just claim. A failure to pay may result from negligence on the part of the insurer and punitive damages are not assessable, again assuming arguendo the objective absence of an arguable reason for such failure to pay. *State Farm Fire & Casualty Co. v. Simpson, supra; Bellefonte Insurance Co. v. Griffith*, 358 So.2d 387, 391 (Miss.1978). I doubt we would uphold an assessment of punitive damages where the insurer acted upon the erroneous advice of counsel, see Freeland, et fil.,

Bad Faith Litigation: A Practical Analysis, 53 Miss.L.J. 237, 250-56 (1983), again though the trier of fact has determined as a matter of fact that the insurer had no arguable reason for denial of the claim. We have only recently recognized that not every case of fraud is a case for punitive damages. *Gardner v. Jones*, 464 So.2d 1144, 1148 (Miss.1985).

We have many cases arising in a variety of factual settings where we have purported to state the rule violation of which will subject one to assessment of punitive damages. *See, e.g., Gardner v. Jones*, 464 So.2d 1144, 1148-49 (Miss.1985); *Snowden v. Osborne*, 269 So.2d 858, 860-61 (Miss.1972); *T.G. Blackwell Co. v. Eshee*, 261 So.2d 481, 485 (Miss.1972); *Seals v. St. Regis Paper Co.*, 236 So.2d 388, 392 (Miss.1970). These opinions are not remarkable for precision in thought or clarity in expression, although I doubt the rule could or should be stated in other than general terms. Out of our cases, nevertheless, there appears two somewhat distinct types of situations where one's conduct may subject him to punitive damages: where the defendant acted with malice and where the defendant acted with gross or reckless disregard for the rights of others. In this setting I would hope that some day soon we would embrace the rule found in Restatement (Second) of Torts §908(2)(1976) to the effect that

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.

I would hope further that this rule would be applied in all punitive damages cases, including bad faith refusal cases. At the very least I hope that at some future date we will return to the view that the rule for assessment of punitive damages is the *same* in bad faith refusal cases as in all others.

V. I Would Affirm Crenshaw's Judgment For $20,000.000 Contract Damages And Add To That Prejudgment Interest, Reasonable Attorneys Fees and Legal Expenses

In the final analysis, I would reverse and render so much of the judgment below as assesses punitive damages against Bankers Life. Dr. McParland from the outset and at trial advised the company that the sole cause of the amputation was Crenshaw's pre-existing arteriosclerosis. Whatever else may be said of that opinion, it furnished Bankers Life with an arguable reason for its refusal to pay. Dr. Westphal, Crenshaw's doctor, conceded that Dr. McParland's opinion could be correct, although he (Dr. Westphal) did not think it was. With respect, I suggest there is no rational basis on which it may be said that Dr. McParland was lying or that his opinion was bogus, contrived, formulated in bad faith. It follows as a matter of law that, when the arguable reason question is viewed under *Paymaster Oil* rule, Bankers Life is entitled to judgment on Crenshaw's claim for punitive damages notwithstanding the verdict of the jury. Failure to prove that element of the bad faith claim causes the entire claim to fall. On this appeal we should reverse and render on the punitive damages issue.

On the other hand, I would affirm the judgment insofar as it awards $20,000.00 in policy benefits to Crenshaw and I would add that pre-judgment interest and attorneys fees and legal expenses. I will explain.

As a part of the positive law of this state, I would have the Court declare that in any action brought by an insured against an insurance company in which the trial court enters judgment in favor of the insured and against the insurer for benefits afforded by a policy of insurance, the judgment shall have added to it

(a) pre-judgment interests at the legal rate beginning 30 days after the insured gave notice of his or her claim

(b) a reasonable attorney's fee not to exceed 25% of the amount of policy benefits recovered

(c) all legal expenses reasonably and necessarily incurred by the insured in the prosecution of the claim.

B. Reasonable And Necessary Attorneys Fees

On the award of attorneys fees, contrary to loose talk in some cases, this Court has long recognized the propriety of awarding attorneys fees *absent statutory authorization.* In the past we have approved awards of attorneys fees when the evidence was such that assessment of punitive damages was allowable, although no statute authorized such. *See, e.g., Aetna Casualty and Surety Co. v. Steele,* 373 So.2d 797, 801 (Miss.1979); *Kalmia Realty & Insurance Co. v. Hopkins,* 163 Miss. 556, 566, 141 So. 903, 904 (1932); *Yazoo & Mississippi Valley Railroad Co. v. Consumers' Ice & Power Co.,* 109 Miss. 43, 48, 67 So.657, 658 (1915). This proposal would merely render less stringent the proof required of the plaintiff insured before attorneys fees could be recovered.

Shifting the burden of attorneys fees and legal expenses to the party adjudged at fault is a growing practice in litigation arising out of commercial or business transactions. The law requiring this emanates from two principal sources: statutory enactments[17] of the legislature and privately made law embodied in agreements between the parties.

In recent years the Mississippi Legislature has enacted a number of statutes authorizing recovery of legal fees and expenses in a business or commercial context. *See, e.g.,* Miss. Code Ann. §11-31-2(3)(c) (Supp.1984) (attorneys

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[17] Because they are enactments of that branch of government most clearly charged with discerning and implementing the public policy of the state, statutes are an important though often neglected source of law. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases,* 50 Geo.W.L.Rev. 554 (1982).

fees recoverable against party who brings attachment in bad faith); §11-53-81 (attorneys fees recoverable in suit on an open account); §75-9-504(1)(a) (1972) (attorneys fees recoverable by secured party disposing of collateral after default); §75-9-506(1972)(attorneys fees must be paid to secured party if debtor redeems collateral); §75-24-15(2) (Supp.1984) (attorneys fees recoverable against violator of Consumer Protection chapter)§75-71-717 (Supp.1984)(attorneys fees recoverable by party who purchased illegal or fraudulent security); §83-21-51(1972) (attorneys fees recovered against foreign insurance company for bad faith).

The overwhelming majority of privately made arrangements—contracts, leases, promissory notes, deeds of trust, security agreements, and the like—provide that the party guilty of breach shall be liable to the other for reasonable attorneys fees and legal expenses. We routinely enforce such agreements. *See, e.g., Vinson v. McCarthy*, 413 So.2d 1026, 1032 (Miss.1982) (attorneys fees clause in promissory note); *Huey v. Port Gibson Bank*, 390 So.2d 1005, 1007 (Miss.1980) (same); *O. J. Stanton & Co. v. Dennis*, 360 So.2d 669, 672 (Miss.1978) (attorneys fee clause in performance bond). The private commercial agreement which does not call for payment of attorneys fees upon breach has become the exception, not the rule, at least numerically speaking.

Little perceptiveness is required to discern the reason for this shifting of the burden of attorneys fees. Where this has been done by statute, the lawmakers invariably faced a situation either (a) where enforcement of important substantive rights by private action was being discouraged by imposing the cost of even successful litigation on the plaintiff or (b) where imposition of the reasonable costs (otherwise non-recoverable costs such as attorneys fees and legal expenses) upon a successful plaintiff would so substantially reduce a successful plaintiff's net recovery as to yield an apparent injustice, this particularly where the rel-

ative capacities to bear the burden of the expense of the litigation is generally so unequal.

Beyond this, it is within our actual and judicial knowledge that, where clauses providing that an unsuccessful defendant must pay reasonable attorneys fees and legal expenses have been made law privately by agreement of the parties, some of the same motivations may be found, principally that otherwise the cost of litigation will substantially reduce the successful plaintiff's net recovery. It should require little imagination to see that these same considerations are present when an insured such as Lloyd Crenshaw brings suit on a health and accident policy against an insurer such as Bankers Life.

In this context, the proposal made here would do nothing more than bring insurance claims litigation in line with the extant public policy of the state in business and commercial transactions, within which generic notions insurance contracts certainly lie.[18]

B. Pre-Judgment Interest

I would award pre-judgment interest on a similar approach.

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[18] My view on this point represents a conscious refinement of the suggestion I made in my concurring opinion in *Blue Cross*, 466 So.2d at 847. Because of the relative economic strength of the litigants and the obvious financial impact on the insured of having to pay his own attorneys fees and legal expenses, I would hold a rule of law that, *if* he prevails on his underlying contract claim, the insured without more becomes entitled to recover reasonable and necessary attorneys fees and legal expenses.

If he had established the two elements of the basic bad faith refusal claim, I would have allowed recovery for actual economic losses or mental anguish—for reasonably forseeable tort damages generally. *Blue Cross*, 466 So.2d at 847. The point is not present in the case at bar, first, because (in my view) Crenshaw has not proved the absence of an arguable reason—an element of the basic bad faith refusal claim, and, second, because Crenshaw made no proof of tort damages.

Crenshaw's claim for benefits was submitted to Bankers Life on April 9, 1979. It has not been paid yet thought, as we unanimously hold (and, indeed, as Bankers Life concedes), it has been authoritatively determined valid.

The insurer's duty in this regard is grounded in part in the insurance contract and in part in the positive law of the state. That duty is not merely to pay valid claims but to pay them promptly.

Little awareness of the realities of life is required to know that the failure of an insurer to pay promptly inflicts loss on the insured of at least three kinds. First, the insured has suffered a loss. He has incurred expenses which have to be paid, normally irrespective of whether or when an insurer pays. Thus the insured relatively speaking becomes strapped for cash while the insurer is processing the claim. Delayed payment may thus impose a great burden upon the insured. Prompt payment may alleviate it.

Second, the use of one's money by another has value in economic theory and in fact. In a thousand contexts in our society this use is compensated by the charging of interest, such charges being imposed variously under the authority of public and privately made law. Changes made upon the use of one's money or forbearance to collect a debt are called interest. *Mississippi Power & Light Co. v. Kustener & Co.*, 156 Miss. 22, 34, 125 So. 429, 432 (1930); *State Highway Commission v. Wunderlich*, 194 Miss. 119, 122, 11 So.2d 437, 438 (1943). The economic value of an insurer's use of an insured's money, pending investigation and processing of a claim, is real and should be compensated via interest.

Third, the real economic value of the benefits due an insured decreases if payment is delayed because of inflation. The rate of inflation may be high or it may be low but it is seldom nothing. We have recognized the impact of inflation upon citizens, and its importance, in a variety of contexts. *Adams v. Adams*, 467 So.2d 211, 215.

(Miss.1985)(child support modification); *Jesco, Inc. v. Shannon*, 451 So.2d 694, 705 (Miss.1984)(impact on damage award in personal injury case); *First National Bank of Vicksburg v. Caruthers*, 443 So.2d 862, 863 (Miss.1983)(factor justifying enforceability of due on sales clause); *Walters v. Inexco Oil Co.*, 440 So.2d 268, 275 (Miss.1983)(impact of delay incident to appeal); *Tedford v. Dempsey*, 437 So.2d 410, 418 (Miss.1983)(support agreement incident to irreconcilable differences divorce); *Mississippi Public Service Commission v. Mississippi Power Co.*, 429 So.2d 883, 890 (Miss.1983)(utility rate increase); *Kennard v. Martin*, 223 So.2d 300, 302 (Miss.1969).

In this context I would have this Court hold that, as a matter of law, prejudgment interest is payable on all insurance contracts, recognizing that even so the insured's loses as a result of delay in payment may only partially be compensated and that the insurer's temptation to delay in order to enjoy the value of the use of their collective insureds' money may only partially be deterred.

Although our cases have been restrictive, we have heretofore recognized the propriety of an award of prejudgment interest *in the absence of statute* where the evidence is sufficient to justify an award of punitive damages. *Stanton & Associates, Inc. v. Bryant Construction Company, Inc.*, 464 So.2d 499, 502 (Miss.1985); *Dunnam v. State Farm Mutual Automobile Insurance Co.*, 366 So.2d 668, 672 (Miss.1979), and in cases where the amount due is liquidated when the claim is originally made, *Home Insurance Company v. Olmstead*, 355 So.2d 310, 314 (Miss.1978). I would hold that the circumstances discussed above regarding the losses suffered by the insured through delay in claims holding, and relative abilities to shoulder these losses of insurer versus insured coupled with the relative bargaining power of insurer versus insured requires that we recognize a lowered threshhold showing before prejudgment interest may be allowed.

We note that there has been in our sister states in recent years an increased recognition of the importance of awarding prejudgment interest in order to assure that the value of a plaintiff's recovery is not unfairly diluted. *E.g., City of Portland v. Hoffman Construction Company*, 266 Or. 789, 596 F.2d 1305, 1315 (1979); *Bond v. City of Huntington*, 276 S.E.2d 539, 546-50 (W.Va.1981). This is particularly so where the claim sounds in contract and seeks compensation for damages sustained in the past. *McIntosh v. Aetna Life Insurance Company*, 268 A.2d 518, 521 (D.C.1970): Restatement (Second), Contracts §347(b)(1979).

The insurer, of course, is entitled to a reasonable period of time within which to investigate and process a claim. This is wholly consistent with the insurer's duty to pay with reasonable promptness. I would hold that prejudgment interest on all first party insurance claims should begin to run thirty days following the insurer's receipt of the proof of claim, unless the equities of a given case clearly indicate that the commencement date should be later.

D. The Judgment The Court Should Order

Applying the foregoing principles to the case at bar, Crenshaw's judgment for $20,000.00 as policy benefits should be affirmed. In addition, I would hold him entitled to interest at the legal rate of eight percent from thirty days after he filed his claim with Bankers Life. This was some time in early 1979. Crenshaw would thus be entitled to at least $9,600.00 in interest (8% of $20,000.00 = $1,600.00 interest per year). In addition, Crenshaw would be entitled to recover his reasonable and necessary attorneys fees and his reasonable and necessary legal expenses, for the determination of which I would remand to the Circuit Court.

So much of the judgment below as awards to Lloyd Crenshaw and assesses against Bankers Life for punitive

damages in any amount I would reverse and render. To the extent that the Court today departs from this view, I respectfully dissent. WALKER, P.J., AND PRATHER, J., JOIN IN THIS OPINION

APPENDIX B

MINUTES, SUPREME COURT OF MISSISSIPPI SEPTEMBER TERM, 1985

WEDNESDAY, SEPTEMBER 11, 1985, COURT SITTING : : : : :

BANKERS LIFE AND CASUALTY COMPANY
#54,123 v
LLOYD M. CRENSHAW

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of Jackson County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 3rd day of December, 1981, be and the same is hereby affirmed. Judgment is in favor of Lloyd M. Crenshaw against Bankers Life and Casualty Company and the American Insurance Company, surety, in the amount of $1,620,000.00 plus interest at the rate of 8% per annum from December 3, 1981, until paid together with all costs taxed in the Lower Court and this Court adds the sum of $243,000.00 being damages at the rate of 15% as provided for by statute. It is further ordered and adjudged that the appellant do pay all of the costs of this appeal to be taxed.

APPENDIX C

MINUTES, SUPREME COURT OF MISSISSIPPI SEPTEMBER TERM 1985

WEDNESDAY, FEBRUARY 26, 1986 :

BANKERS LIFE & CASUALTY COMPANY

#54,123 v.
LLOYD M. CRENSHAW

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order that said petition be and the same is hereby denied. This cause this day also came on to be heard on Motion to Correct Judgment and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order that said motion be and the same is hereby overruled.

ATTEST
A True Copy
This 10th day of
March, 1986
Illegible line
SUPREME COURT OF MISSISSIPPI

By Illegible Signature

APPENDIX D

JURY VERDICT FOR PLAINTIFF MONEY JUDGMENT

LLOYD M. CRENSHAW
VS. NO 11,292
BANKERS LIFE AND CASUALTY COMPANY

This cause coming on for hearing on this a regular day of this term of Court, comes parties Plaintiff and Defendant in person and by their respective attorneys of record and both having announced ready for trial, and issue being joined herein;

Whereupon came a Jury composed of JAMES HAROLD SMITH and eleven other good and lawful Jurors of Jackson County, Mississippi, who having been empaneled, selected and accepted by both Plaintiff and Defendant, after hearing all of the evidence introduced, heard argument of counsel and received the instructions of the Court, retired to consider their verdict, and presently returned into open court the following verdict, to-wit:

> "We, the jury, find for the Plaintiff, Lloyd M. Crenshaw, and assess his actual damages at $20,000.00 and assess Punitive damages against Bankers Life And Caualty Company" at $1,600,000

It is accordingly the judgment of the Court and so ordered by the Court that Plaintiff Lloyd M. Crenshaw do have and recover judgement of and from Defendant Bankers Life and Casualty Company the sum of $1,620,000 together with all costs as accrued in this cause for all of which let all proper process issue.

Ordered this the 3rd day of December A.D. 1981

FILED
3rd day of December 1981
Joe W. Martin, Jr. Clerk

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY COMPANY
APPELLANT

VS.

LLOYD M. CRENSHAW
APPELLEE

RECEIVED

OCT 11 1985

MOTION TO CORRECT JUDGMENT

COMES NOW Bankers Life and Casualty Company, pursuant to Rule 19, and moves this Court to Correct its Mandate issued in this cause so as to delete the 15% statutory penalty assessed against Bankers Life, and in support of its Motion would show the following, to-wit:

1. On September 11, 1985, this Court issued its mandate in this cause affirming the judgment against Bankers Life and Casualty Company in the amount of $20,000 actual damages and $1,600,000 punitive damages with interest thereon. The mandate also included the sum of $243,000 as a penalty for damages of 15% of the amount of judg-

ment as provided by Miss. Code Ann. § 11-3-23 (Supp. 1985) (Minute Book "BY", Page 29).

2. Bankers Life and Casualty Company submits that Miss. Code Ann. § 11-3-23 is unconstitutional on its face and in application as the statute violates the rights of equal protection and due process of Bankers Life and others similarly situated which are guaranteed by the United States and Mississippi Constitutions.

3. The statute should be struck as unconstitutional by this Court and the mandate corrected to delete the 15% penalty.

Respectfully submitted,

Charles G. Copeland
CHARLES G. COPELAND
J. TUCKER MITCHELL
Post Office Drawer 2132
Jackson, Mississippi 39225-2132

JOHN M. KINARD
MICHAEL J. MCELHANEY
POST Office Box 787
Pascagoula, Mississippi 39567

OF COUNSEL:

COPELAND, COOK, TAYLOR & BUSH
Suite 112 Capital Towers
Post Office Drawer 2132
Jackson, Mississippi 39225-2132

Phone: (601) 354-0123

MEGEHEE, BROWN, WILLIAMS AND MESTAYER

3112 Canty Street

Post Office Box 787

Pascagoula, Mississippi 39567

Phone: (601) 762-2271

CERTIFICATION

I, CHARLES G. COPELAND, do hereby certify that I have personally read a copy of the judgment and mandate and that the relief sought by Appellant is not already contained in the judgment.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

CERTIFICATE OF SERVICE

I, CHARLES G. COPELAND, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Motion to Correct Mandate to ERNEST R. SCHROEDER, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 39567, Attorney for Appellee.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY COMPANY
APPELLANT

VS.

LLOYD M. CRENSHAW
APPELLEE

APPELLANT'S BRIEF IN SUPPORT OF MOTION TO CORRECT JUDGMENT

CHARLES G. COPELAND
J. TUCKER MITCHELL
COPELAND, COOK, TAYLOR AND BUSH
Post Office Box 2132
Jackson, Mississippi 39225-2132
Phone: 601-354-0123

and

JOHN M. KINARD
MICHAEL J. McELHAYEY
MEGEHEE, BROWN, WILLIAMS AND MESTAYER
Post Office Box 787
Pascagoula, Mississippi 39567
Phone: 601-762-2271

ATTORNEYS FOR APPELLANT, BANKERS
LIFE AND CASUALTY COMPANY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY COMPANY
APPELLANT

VS.

LLOYD M. CRENSHAW
APPELLEE

APPELLANT'S BRIEF IN SUPPORT OF MOTION TO CORRECT JUDGMENT

On September 11, 1985, this Court issued its mandate in this cause affirming the judgment against Bankers Life and Casualty Company ("Bankers Life") in the amount of $20,000 actual damages and $1,600,000 punitive damages with interest thereon at the rate of eight percent (8%) per annum from December 3, 1981. The Court also added the sum of

43,000 as a penalty or damages of 15% of the amount of judgment as provided for by Miss. Code Ann. § 11-3-23. (Minute Book "EY", Page 29).

Miss. Code Ann. § 11-3-23, which automatically applies a penalty of 15% of the original judgment as damages, is unconstitutional. The statute violates the rights of equal protection and due process guaranteed by the United States and Mississippi Constitutions. It imposes a barrier to appeal to the Mississippi Supreme Court that is not reasonably related to any legitimate or articulated statutory purpose.

The statute also fails to meet due process requirements as it creates a substantial and unnecessary risk by which an appellant such as Bankers Life is wrongfully deprived of a significant property interest. The statute is not the least restrictive means of accomplishing a purpose of compensating the appellee or of deterring frivolous appeals and appeals taken for delay. The statute should be struck as unconstitutional by this Court and the mandate corrected to delete the penalty allowed.

ARGUMENT

A. MISS. CODE ANN. § 11-3-23 (SUPP. 1985)

Mississippi has imposed a mandatory penalty on parties who unsuccessfully appeal to the Mississippi Supreme Court since 1857. Miss. Rev. Code, ch. 63, art. 12 (1857) (imposing mandatory damages of 5% of the judgment if judgment was affirmed on appeal). The amount of the penalty was increased to 15% in 1980 by amendments to Miss. Code Ann. § 11-3-23 (Supp. 1985), which reads in part as follows:

> In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money the damages shall be upon such sum. . . .

Section 11-3-23 operates as a *mandatory* imposition of a fixed penalty on an unsuccessful appellant. The statute does not state any expressed legislative purpose. This Court has described the purpose of § 11-3-23 as the compensation to the successful appellee for expenses or costs incurred through the wrongful appeal by his adversary. *Canal Bank and Trust Co. v. Brewer,* 147 Miss. 85, 114 So. 127 (1927)

(applying 5% statutory penalty). Another assumed purpose of Mississippi's appeal penalty statute is the State's interest in discouraging unfounded appeals. *Tigner v. McGehee,* 60 Miss. 242 (1882).

B. EQUAL PROTECTION

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." United States Const. Amend. XIV, Section 1. The U. S. Supreme Court has held that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review." *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). However, if a State does afford an appeal, "it cannot be granted to some litigants and *capriciously* or *arbitrarily* denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). The U. S. Supreme Court in *Lindsey* also stated that a State may act "to discourage blatently insubstantial appeals . . . if [its] rules are *reasonably tailored to achieve these ends* and if they are *uniformly and nondiscriminately applied. Id.* at 78. (Emphasis added).

In *Lindsey v. Normet,* the U. S. Supreme Court struck down the Oregon Forceful Entry and Wrongful Detainer Statute which required a double bond as a prerequisite to an appeal and provided that upon affirmance of judgment the appellee collected the entire amount of the double bond. The Court emphasized that sub penalty statutes will only be upheld if "uniformly and nondiscriminately applied." The Court found the double bond was not reasonably related to a legitimate legislative purpose. Additionally, the statute discouraged meritorious as well as frivolous appeals and discriminated against lessees who could not post bond to the extent of creating a barrier to appeal. The Court stated, "for them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be." *Id.* at 79. The Supreme Court also noted that since the ap-

pellee was automatically awarded the entire amount of the bond on affirmance, the provisions operated as "an automatic assessment of unproved damages." *Id.* at 78.

If the application of § 11-3-23 discourages an appeal "capriciously or arbitrarily" to some, it violates the Equal Protection Clause. *Lindsey v. Normet.* If the statute is to be upheld as constitutional it must be rationally related to a legitimate legislative purpose and a logical connection must exist between the statutory purpose and the classification created by the statute. *United States Dep't. of Agriculture v. Moreno,* 413 U.S. 528, 533 (1973).

The Ninth Circuit Court of Appeals has recognized that the "appellee's cost of appeal" argument described in *Canal Bank & Trust Co. v. Brewer* is not legitimate. *O'Day v. George Arakelian Farms, Inc.,* 536 F.2d 856, 860 (9th Cir. 1976). In *O'Day*, the Court of Appeals applied the U. S. Supreme Court reasoning in *Lindsey* to a double bond requirement of the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499g(c). The Court, citing *Lindsey,* held that when a state does provide an appeal, the procedure cannot be arbitrarily denied to some persons and, for the double bond requirement to be upheld the provision must be reasonably tailored and uniformly and nondiscriminately applied. *Id.* at 860. The Court stated:

> As applied to the appellant in this case, the double bond requirement is not reasonably or rationally related to a legitimate governmental purpose and constitutes an effective bar to appeal. It therefore arbitrarily denies appellant and similarly situated litigants the statutory right to appeal.
>
> The stated purpose of the double bond requirement was 'to discourage frivolous appeals taken for the purpose of delaying payment and thereby tending to defeat the purpose of the act.' . . . As noted, *Lindsey* expressly held that there is no

> rational relation between this admittedly legitimate purpose and a double bond requirement.
>
> * * * * *
>
> *Lindsey* also makes clear, however, that the requirement imposed must be rationally related to securing the interest involved. Legislative categories need not be drawn with 'mathematical nicety' . . ., for classification necessarily involves approximation; but legislative classifications which are not only imprecise, but lack rational relationship to their avowed purpose, are invalid. *Id.* at 859-60.

In recognizing that the appeal penalty is not related to appellee's expenses on appeal, the Court in *O'Day* stated:

> If the claim is small, the product will be wholly inadequate; if the claim is large, as in this case, it will be grossly excessive. Risk and security will coincide only fortuitously if at all. Id. at 860.

It is clear that under § 11-3-23, successful appellees receive a 15% "windfall" totally unrelated to any costs they might have incurred. Section 11-3-23 is violative of the Equal Protection Clause as it fails to relate in any manner to the amount of actual costs incurred by the appellee.

If the purpose of § 11-3-23 is considered to be prevention of frivolous appeals, it is manifestly overinclusive and unreasonably severe, and at the same time, it is irrationally underinclusive. Under § 11-3-23, Bankers Life and other defendant-appellants in similar positions are subjected to an automatic, nondiscretionary 15% penalty, payable to the plaintiff-appellee, upon affirmance of a money judgment, even where the issues are novel, complex, and open to dispute so that they divide the decision of this Court 6/3 on liability and 5/4 on damages and require consideration by the Court for over 20 months.

By imposing a 15% penalty on all parties who appeal a monetary judgment subsequently affirmed, § 11-3-23 burdens not only parties bringing frivolous appeals but also parties who appeal in good faith on a defense that, although unsuccessful, might nevertheless be meritorious. Thus, the requisite degree of relatedness between the class designated and the statute's penal or deterrent objective is not present. Under the operation of the statute, the question is not if error will occur, but how often? It is certain that unsuccessful defendant-appellants with meritorious defenses will be penalized. This overinclusiveness creates fundamental unfairness, unreasonableness and arbitrariness which is prohibited by the Constitution in providing equal protection of the laws. Thus, the section is plainly overinclusive as it discourages both frivolous and meritorious but unsuccessful appeals.

The section is also underinclusive and violates equal protection requirements as it does not apply to all classes of appellants equally. Appellants in civil actions for monetary damages may be divided into three classes: (1) Defendant-appellants against whom a monetary judgment has been awarded; (2) plaintiff-appellants for whom a monetary award has been granted and who appeal seeking a larger award; and (3) plaintiff-appellants who appeal a judgment for the defendant. Section 11-3-23 is not applicable to the third class because there is no monetary judgment on which to assess the statutory penalty. The exclusion of certain plaintiff-appellants who are unsuccessful on appeal is irreconcilable with the purpose of penalizing and deterring frivolous appeals. It is well recognized that to pass constitutional requirements differential treatment of a designated class from those outside the class must be justified by a genuine and *substantial* difference relevant to state objectives. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). In application, the appeal penalty statute does not apply to all "appellants". This favorable treat-

ment to some plaintiff-appellants is constitutionally forbidden.

C. DUE PROCESS

Although the Due Process Clause of the Constitution does not guarantee a right to appeal, it does require "some form of hearing before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A person has a true property interest in his money, therefore, before § 11-3-23 can deprive an unsuccessful appellant, such as Bankers Life, of its money the requirements of due process must be met. The requirements of due process are set forth in *Mathews v. Eldridge:*

> [The test] requires consideration of three distinct factors: First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

The *Mathews* test is now applicable not only to the decision of the form of hearing required, but also to other elements that effect the "fundamental fairness" of the hearing. *Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981).

Section 11-3-23 permanently deprives the unsuccessful appellant of his property in violation of the Due Process Clause. The appellant's deprivation is final, and he has no recourse through which to recover his property because the imposition of the penalty is mandatory. *See, Lassiter v. Department of Social Services.* If the imposition of the penalty were discretionary, the appellant could seek review

of the decision through appeal, however, it is not. Mississippi's statute provides no safeguards whatsoever to prevent wrongful deprivation of property. Section 11-3-23 imposes an automatic penalty without the benefit of any consideration of the amount of damage to the appellee. This is also the case with frivolity of the appeal. The statute neither allows evidence to be presented by the parties nor requires a finding by the Court that an appeal is frivolous.

Perhaps most importantly, the "good faith judgment" that the *Mathews* Court found significant is not present because the penalty is mandatory. Allowing the Court to exercise its discretion in deciding the appropriateness of penalizing the appellant, would pose only a slight administrative burden on the State. The State's pecuniary interest and any slight inconvenience is outweighed by the interest it shares with the individual in an accurate and just decision. Section 11-3-23 shows no concern for the rights of appellants and exhibits no "good faith judgment" before imposing the penalty. Thus, in addition to being unconstitutional on equal protection grounds, Mississippi's statute is unconstitutional because it denies Bankers Life its right to due process.

D. AUTHORITIES INTERPRETING MISS. CODE ANN. § 11-3-23

The constitutionality of Mississippi's appeal penalty statute was recently discussed in *Affholder, Inc. v. Southern Rock, Inc.*, 746 nF.2d 305 (5th Cir. 1984). In that case, the appellee, having prevailed on appeal in a diversity case, sought to recover 15% of his judgment. The Court held that the Mississippi 15% appeal penalty statute will no longer be applied by the Federal Court of Appeals in diversity cases arising out of Mississippi. However, the case has greater impact than curing this problem in the Federal Court system. In so holding, the Fifth Circuit Court of Appeals stated:

> The Mississippi statute is also designed to avoid frivolous appeals, but at the same time, it also penalizes those that are merely unsuccessful, even those whose appeal has such merit as to evoke a dissenting opinion. *Unlike Rule 38, the Mississippi statute makes the penalty mandatory. The mechanical application of this rule allows for no discretion, and the penalty 'must be assessed even though the justness of doing so is not apparent.' Regardless of the merits of an appeal therefore, 'the ordeal of defending an appeal is viewed by Mississippi as an injury to the appellee' and its statute, 'provides "a measure of compensation for the successful appellee, compensation for his having endured the slings and arrows of successful appellate litigation."'*
>
> * * * * *
>
> *In reaching the decision to appeal, an appellant must take into account the penalty that will be exacted if he does not succeed. It thus acts as a deterrent to exercise of the right to appeal. Id.* at 309. (Emphasis added).

In the *Affholder* case, the Court recognized that the Mississippi penalty statute creates a "chilling effect" on the appellant's constitutional rights to a trial. Specifically, it serves as a deterrent to an appeal by a defendant who has a monetary jury award entered against him. It does not apply to an unsuccessful plaintiff who receives no monetary award in the lower court and then appeals. If the defendant wins and the plaintiff appeals, there is no money judgment against which to apply the penalty even though the defendant would incur the same additional type of attorneys' fees and expenses. The statute clearly does not treat all appellants equally.

In *Wallace v. Jones,* 360 So.2d 932 (Miss. 1978), the appellant challenged the constitutionality of Mississippi's

appeal penalty statute which allowed a penalty of 5% against unsuccessful appellants. The appellant asserted that the statute violated the equal protection requirements of the Fourteenth Amendment. Justice Sugg, for the Court, held that the statute as applied does not violate the due process requirements of the Fourteenth Amendment. In so holding, the Court stated:

> If a plaintiff recovers a judgment against a defendant, appeals, and the judgment is affirmed, plaintiff is assessed 5% damages on the amount of the judgment appealed from. *Pearce v. Ford Motor Co.*, 235 So.2d 281 (Miss. 1970). The statute does not discriminate against a class of litigants because all unsuccessful appellants, whether plaintiff or defendant, are subjected to 5% damages where the judgment or decree appealed from permits recovery. *Id.* at 933.

CONCLUSION

Miss. Code Ann. § 11-3-23 is in violation of the Equal Protection Clause because it creates a barrier or "chilling effect" to appeal that is not reasonably related to any conceivable or articulated statutory purpose. The statute also fails to meet the prerequisites of due process because it creates a substantial and unnecessary risk by which Bankers Life is wrongfully deprived of its significant property interests. The statute is not the least restrictive means of accomplishing the purposes of preventing frivolous appeals and appeals for delay and compensating the appellees for expenses on appeal. Much less restrictive alternative means are reasonable and available and could be implemented to accomplish the same purposes. The statute should be struck and the mandate corrected.

Respectfully submitted,

Charles G. Copeland

CHARLES G. COPELAND
J. TUCKER MITCHELL
Post Office Drawer 2132
Jackson, Mississippi 39225-2132

JOHN M. KINARD
MICHAEL J. MCELHANEY
POST Office Box 787
Pascagoula, Mississippi 39567

ATTORNEYS FOR APPELLANT, BANKERS LIFE AND CASUALTY COMPANY

OF COUNSEL:

COPELAND, COOK, TAYLOR & BUSH
Suite 112 Capital Towers
Post Office Drawer 2132
Jackson, Mississippi 39225-2132
Phone: (601) 354-0123

MEGEHEE, BROWN, WILLIAMS AND MESTAYER
3112 Canty Street
Post Office Box 787
Pascagoula, Mississippi 39567
Phone: (601) 762-2271

CERTIFICATE OF SERVICE

I, CHARLES G. COPELAND, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing Appellant's Brief in Support of Motion to Correct Judgment to ERNEST R. SCHROEDER, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 39567, Attorney for Appellee.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54, 123

BANKERS LIFE AND CASUALTY COMPANY
Appellant

vs.

LLOYD M. CRENSHAW
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bankers Life and Casualty Company, the Appellant in the abovenamed, hereby appeals to the Supreme Court of the United States from:

(a) The final judgment of the Supreme Court of the State of Mississippi of September 11, 1985, affirming the judgment of the Circuit Court of Jackson County, Mississippi against Appellant entered in this action on December 3, 1981;

(b) The final order, issued by the Supreme Court of Mississippi, overruling Appellant's Petition for Rehearing and Motion to Correct Judgment, entered on February 26, 1986.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

BANKERS LIFE AND CASUALTY
COMPANY

By: /s/Charles G. Copeland
CHARLES G. COPELAND
J. TUCKER MITCHELL
Attorneys for Appellant

COPELAND, COOK, TAYLOR & BUSH
Suite 112 Capital Towers
Post Office Drawer 2132
Jackson, Mississippi 39225-2132
Phone: (601) 354-0123

CERTIFICATE OF SERVICE

A true copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been mailed, postage prepaid, to the HONORABLE ERNEST R. SCHROEDER, ESQ. and the HONORABLE JOHN A. BANAHAN, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 39567, Attorney for Appellee.

THIS, the 9th day of April, 1986.

/s/Charles G. Copeland

CHARLES G. COPELAND

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY COMPANY
Appellant

Versus

LLOYD M. CRENSHAW
Appellee

BRIEF OF APPELLANT

GEORGE F. WOODLIFF
CHARLES G. COPELAND
HEIDELBERG, WOODLIFF & FRANKS
Suite 1030 Capital Towers
Jackson, Mississippi 39201
Phone: 601-948-3800

AND

JOHN M. KINARD
MICHAEL J. MCELHANEY
MEGEHEE, BROWN, WILLIAMS & MESTAYER
Post Office Box 787
Pascagoula, Mississippi 39567

Phone: 601-762-2271

ATTORNEYS FOR APPELLANT,
BANKERS LIFE &
CASUALTY COMPANY

* * * * *

B.

THE AWARD OF PUNITIVE DAMAGES WAS GROSSLY EXCESSIVE

PREFACE

A defendant in a civil action is always faced with the dilemma of whether to argue damages. An argument concerning damages often influences the trier of fact to believe the defendant has conceded liability or at least is not strongly confident in its position on liability. This dilemma is present in this appeal. BANKERS LIFE AND CASUALTY INSURANCE COMPANY AND ITS COUNSEL EMPHATICALLY BELIEVE THAT THIS IS NOT A PROPER CASE FOR PUNITIVE DAMAGES AND URGE THIS COURT TO SO FIND. Nevertheless, not having access to a crystal ball and being faced with an extremely large (and unjust) punitive damage award, Bankers Life and Casualty will discuss the size of the award. This decision is predicated upon its confidence in this Court to reject the natural instinct to discount the weight of an argument on liability when an argument on damages is made.

1. THIS COURT HAS THE POWER AND DUTY TO REDUCE EXCESSIVE PUNITIVE DAMAGES

This Court recognized its authority to review the size of a punitive damage award in *Standard Life v. Veal* where Standard raised as an issue on appeal the failure of the

trial court to reduce the amount of the $25,000.00 punitive damage award. This Court held "[i]n this case we are of the opinion that the award is not excessive." 354 So.2d at 249. In *Consolidated American v. Toche* the majority reversed the punitive damage award, however, Judge Bowling, in his dissent, indicated that in his opinion he "would affirm the punitive damage award and *direct that a remittitur be entered because of its amount.*" 410 So.2d at 1308 (emphasis added).

This Court also recognized its power to address the size of a punitive damage award in *First American National Bank v. Mitchell,* 359 So.2d 1376 (Miss. 1978).

> Although punitive damages may properly be awarded against FANB due to the fraudulent acts of its officer or agent, *$250,000 is so grossly excessive that the amount is shocking.* Not only is the record deficient and unclear as to proof of actual damages above $35,000, no proffer was made of adequate proof of the net worth or financial condition of FANB. *Snowden v. Osborne,* 269 So.2d 858 (miss. 1972). Absent some proper showing of the net worth or financial condition of FANB, *we have no way to measure the correctness of the punitive damage award ($250,000) which on its face seems totally unrealistic upon the record.* Accordingly, remand is necessary for retrial on the sole issue of damages: actual and punitive.

359 So.2d at 1381 (emphasis added).

Similarly, in *Snowden v. Osborne,* 269 So.2d 858 (Miss. 1972) an assault and battery case, this Court addressed the size of a punitive damage award[10] as follows:

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[10] This Court in *Snowden* also set out the factors to be considered by the reviewing Court: [1] *financial worth of defendant*; [2] size of the combatants, [3] knowledge of previous heart attacks, [4] malice, and

> The more difficult problem arises from the amount of the award for punitive damages. Though we have opined the instruction to be proper, we are nevertheless constrained to the opinion that there was insufficient evidence adduced to affirm a punitive award in the sum of $30,000. Tfhe record is silent as to the [1] *worth of the defendant* although it does reveal that he had prior to this suit disposed of his real property without mentioning the consideration received. It is also silent as to the [2] *physical size* of the combatants as well as their respective ages, and although these characteristics could have been and probably were observed by the jury, we have no such opportunity of observance. It is likewise silent as to whether the defendant had [3] *knowledge of the previous heart attacks* suffered by the plaintiff which [4] *could be indicative of malice* since he was found by the jury [5] *to be the aggressor.* We are, in fact, on review, left in a complete quandary by the vacuum in the record as to the *appropriateness of the judgment* by way of punitive damages other than to say *that it seems, on its face, to be* [6] *disproportionate to the physical injuries inflicted.*

269 So.2d at 861 (emphasis added).

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[5] who was the aggressor (*nature of Defendant's acts*); and [6] *relationship to actual injuries.* These factors are discussed beginning at Page 21.

Many other courts have reduced punitive damage awards which were found to be excessive.[11] A California court discussed the scope of the review in punitive damages cases and held that the appellate court *not only has the power to review but the duty:* "[w]hen the award, as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumtpion that is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act." *Rosenberg v. J. C. Penney Co.*, 30 Cal.App.2d 609, 628, 86 P.2d 696, 706 (1939) (emphasis added). The United States district judge in *Alexander v. B-W Acceptance Corp.*, 311 F. Supp. 299, 300-301 (W.D. Mo. 1969) discussed the law as follows:

> While the amount of punitive damages lies solely within the jury's discretion, it will be deemed excessive if the size of the award indicates passion, prejudice or bias or has no reasonable relation to the actual injury inflicted. This is the rule under Missouri law. See Hunter v. Kansas City Rys. Co., 213 Mo.App. 233, 248 S.W. 998. 'Generally, punitive damages must bear some relation to the injury inflicted and the cause thereof.' Beggs v. Universal C.I.T. Credit Corporation, Mo., 409 S.W.2d 719, 724.

A review of the law from this jurisdiction and other jurisdictions clearly shows that a reviewing court has the power as well as the *duty* to set aside excessive punitive damages awards. This premise is logical. In our juris-

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[11] *See e.g. Galindo v. Western States Collection Co.*, 82 N.M. 149, 477 P.2d 325 (1970) (Court held that the award of $5,000 in punitive damages was excessive and unrelated to the injury and actual damages); *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845 (Ind. 1977) (Court found that punitive damage award was "*at first blush outrageous and excessive*" and remanded for remittitur; *Gray v. Allison Division, General Motors Corp.*, 52 ___App.2d 348, 370 N.E.2d 747 (1977) (punitive damages were excessive and grossly disproportionate to the actual damages awarded).

prudence the basic purpose of an appeals court is to insure the fairness of trials in lower courts. While some actions are given a presumption of validity, any obviously erroneous result can be submitted for review upon appeal unless precluded by legislative mandate. Tfhe jury in the instant case awarded $1,600,000 in punitive damages and $20,000 in compensatory damages. The punitive damage award of $1,600,000 is *"grossly excessive that the amount is shocking"* and *"on its face seems totally unrealistic."* *First American National Bank v. Mitchell,* 259 So.2d 1376, 1381 (Miss. 1978).

2. RELATIONSHIP BETWEEN PUNITIVE AND ACTUAL DAMAGE

The general rule is that the amount of actual or compensatory damages should be taken into account when awarding punitive damages and the two awards should not be disproportionate. 25 C.J.S. *Damages* § 126(1); 22 Am. Jur. 2d *Damages* § 266. Reviewing courts, in reducing awards of punitive damages, base their decision upon several factors, none of which is more important than the amount of compensatory damages awarded. *Galindo v. Western States Collegtion Co.,* 82 N.M. 149, 477 P.2d 325 (1970), is representative of this point. In *Galindo,* a wrongful garnishment case, the court found a punitive damage award to be excessive and stated:

> The trial court awarded punitive damages of $5000.00. The rule is that the amount of punitive damages is left to the discretion of the fact finder, *'* * * but must not be so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason and justice.* * * *'* [citation omitted].

477 P.2d at 332 (emphasis added).

The Utah Supreme Court addressed this same point in *Falkenberg v. Neff,* 269 P. 1008 (1928) and gave extensive citation for its reasoning:

> There is no definite basis upon which the amount can be computed, but *there must necessarily be a limit to the amount which may be awarded. It is the general rule that the award should not be disproportionate to the actual damage sustained, or should bear some relation to the injury complained of and the cause thereof.* 17 C.J. 995. See, also, 1 Sedgwick on Damages, § 388. In Rider v. York H. W. & P. Co., 251 Pa. 18, 95 A. 803, where $1,000 compensatory damages were awarded for injuries to land from diversion of water an award of $2,700 punitive damages was held to be excessive as *disproportionate.* In Plotnik v. Rosenberg, 55 Cal.App. 408, 203 P. 438, where the actual damages claimed was $15.60, a judgment awarding $1,500 as compensatory and exemplary damages, it was held that the exemplary damages allowed was *out of all proportion* to the actual damages and the judgment was ordered reduced on appeal to $300. In Pendleton v. Norfolk, & W. R. Co., 82 W. Va. 270, 95 S.E. 941, 16 A.L.R. 761, the verdict in an action for damages for assault and battery was for $557.50 actual and $5,000 punitive damages. On appeal, the verdict was held excessive and *disproportionate* to the actual damages, and the judgment was reversed. In the case at bar, we are forced to the conclusion that the punitive damages allowed are so excessive *and disproportionate to the actual damages sustained* that as a matter of law the verdict and judgment cannot be upheld.

269 P. at 1013 (emphasis added).

Literally hundreds of other cases indicate that courts will weigh the amount of the punitive damages against

the amount of compensatory damages.[12] In the instant case, the punitive damage award of $1,600,000 was 8000% of the $20,000 awarded as compensatory damages. Surely this escessive award cannot stand the test of the reasonable relation rule. The $1,600,000.00 award on its face alone is totally unreasonable.

3. THE AMOUNT OF PUNITIVE DAMAGES AWARDED IS EXCESSIVE IN LIGHT OF STATUTES FROM OTHER JURISDICTIONS

Many states have statutes that legislatively set the penalties for breach of insurance contracts as a percentage of the compensatory award. A portion of the Georgia statute which is representative reads as follows:

> In the event of a loss which is covered by a policy of insurance and the refusal of the insurer to pay the same within 60 days after a demand has been made by the holder of the policy and a finding has been made that *such refusal was in bad faith,* the insurer shall be liable to pay such holder in addition to the loss, not more than *25 per cent* of the liability of the insurer for the loss and all reasonable attorney's fees for the prosecution of the case against the insurer.

GA. CODE ANN. § 56-1206. (emphasis added).

In Arkansas, the amount is 12% (ARK. STAT. ANN. § 66-3238), in Louisiana 12% (LA. REV. STAT. ANN. §

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[12] *See e.g. Stambaugh v. International Harvester*, 435 N.E.2d 729 (Ill. App. 1982). (Court reduced a $7,500,000 punitive damage judgment to $650,000 noting that the judgment was 23 times the amount of compensatory damages which were also $650,000); *Taylor v. Sandoval*, 442 F. Supp. 491 (D.Colo. 1977) (court reduced exemplary damage noting there must be a relationship between the actual damages were only $1,800); *Montgomery v. Tufford*, 437 P.2d 36 (Colo. 1968)(award of $5,500 was reversed as excessive, noting exemplary damages must bear reasonable relation to compensatory damages.)

22:658) and in Tennessee 25% (TENN. CODE ANN. § 56-3-105). The statutes vary, *but no statute* provides for *a penalty of 9,000%.*

4. RELATIONSHIP OF AMOUNT OF PUNITIVE DAMAGES TO NATURE OF DEFENDANT'S ACTS

This Court has recognized that punitive damages should be awarded only in cases of wanton, gross or intentional misconduct, *State Farm v. Roberts,* that mere negligence is not enough, *Bellefonte v. Griffin,* and that punitive damages are assessed as an example and warning to others, *Standard Life v. Veal.* The degree of reprehensibility of the actions of the defendant, if any, is an important factor to be considered by the reviewing court on appeal. *See Snowden v. Osborne,* 269 So.2d 858 (Miss. 1972) and discussion of this case at note 10, p.19. One court set out the factors to be considered as follows:

> The factors to be considered in assessing the award include [1] *the nature of the defendant's acts,* [2] *the amount of compensatory damages awarded* and [3] *the wealth of a particular* defendant. [citation omitted]. Generally, the more reprehensible the act, the greater the appropriate punishment. However, an act of considerable reprehensibility will not justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small.

Walker v. Signal Companies, Inc., 84 Cal.App.3d 982, 149 Cal. Reptr. 119, 126 (1976)(emphasis added).

Bankers Life's conduct in the present case was not wanton, grossly negligent or intentional so as to warrant any award of punitive damages. Without a doubt, the company's conduct was certainly not reprehsnsible to the degree of $1,600,000. The only possible criticism of Bankers Life was that it accepted the opinion of Dr. McParlin over the opinion of Crenshaw's doctors. If this is an act for

which Bankers Life should be punished, which it emphatically disputes, then surely the nature of the act does not call for a $1,600,000 award of punitive damages, over eighty times the compensatory award. In *Travelers v. Wetherbee,* Travelers deliberately delayed the payment of an undisputed contents claim to coerce a lower settlement of a structural loss claim. The punitive damage award affirmed by this Court for this deliberate coercive act was $50,000. In *Standard Life v. Veal,* Standard Life blatently ignored the provisions of its own policy. The punitive damages award was for $25,000. What did Bankers Life do to justify a $1,600,000 punishment?

5. THE AMOUNT OF PUNITIVE DAMAGES WAS EXCESSIVE IN RELATION TO THE APPELLANT'S NET WORTH

This Court has recognized that the defendant's wealth should be considered when assessing punitive damages, *Allen v. Ritter,* 235 So.2d 253, 256 (Miss. 1970). Bankers Life's financial statement of 1980 shows that it had net assets of $294,162,474. (See line 50, "capital and surplus . . . for current year" on page 4 of Exhibit 9 found at page 762 of the Record.) In closing argument by plaintiffs' counsel the net assets were incorrectly stated to be $264,285,856. (Actually net assets the prior year). In the ten cases where this Court has addressed the issue of punitive damages for breach of insurance contracts, none of the awards for punitive damages even came remotely close to the excessive award in the instant case. Several of the insurance companies were larger in net assets than Bankers Life. For example: In *State Farm v. Roberts,* the punitive damages award was $20,000. State Farm has net assets in excess of 775 million dollars.[13] In *Aetna v Steele,* the punitive damage award was $35,000. Aetna has net assets in excess of 116 million dollars. In *Lincoln National*

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[13] All net assets are from *Annual Report of the Insurance Department of the State of Mississippi,* (March 1, 1979 to February 29, 1980).

v. Crews, the punitive damage award was $2,308.28. Lincoln National has net assets in excess of 241 million dollars. In *Travelers v. Wetherbee,* this Court upheld a $50,000 punitive damages award against Travelers, a company with net assets in excess of 960 million dollars.

In evaluating the punitive damage award against Bankers Life, this Court should take notice of both the size of other punitive damage awards in Mississippi and the relative net

> It amounted to eight days of interest income for the company. So, if you are talking about penalty—and that's what your argument was—that's not very much penalty to this company—taking away one day's income out of three hundred and sixty days—it's not very much penalty, although it's a large sum of money. So, if you look at it from the standpoint of 'are we penalizing that company?' I can't say that that's very much penalty to a company making that kind of money. *And you start talking about people paying income tax to this state and this country making Ten Thousand Dollars a year and here you have somebody making Seventy-Three Million Dollars* and *I'll bet you they have got every loophole you can think of.* Now, you justify that. I don't say it's correct or not, but that's my recollection of the testimony. But anyway, I don't have the authority to change the punitive damages.

(A.106, 107)(emphasis added)

The incredible statement, "I'll bet you they have got every loophole you can think of" puts the last nail in the coffin. To have the Circuit Judge while sitting on the Bench make an incorrect statement about nine stockholders receiving $73,000,000 profit each, when Appellee's own exhibit shows that the Company was owned by a foundation; to have him "bet" that these imaginary nine stockholders making

$73,000,000 have "every loophole"; and to have him demand that counsel "justify" the wealth and income of Bankers Life (McArthur Foundation) is a most cogent illustration of an environment in which Bankers Life had no chance whatsoever to receive a fair trial. If the Trial Judge was caught by and inflamed by the highly prejudicial argument of Crenshaw's counsel so as to openly show resentment, jealousy and prejudice against Bankers Life and its alleged stockholders due to its seemingly large financial wealth, it can be said with certainty that the lay citizens of Jackson County were even more taken in. The result was the $1,600,000 verdict. Appellant's motion for a mistrial (A.) should have been sustained.

F.
THE AWARD OF PUNITIVE DAMAGES VIOLATES APPELLANT'S DUE PROCESS RIGHTS

The right of access to the courts is a findamental right implicit in the concept of ordered liberty and guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution; *Ex Parte Hull,* 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed 1034 (1941); *Johnson v. Avery,* 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); and Sections 24 and 25 of Article 3 of the Mississippi Constitution of 1890. The threat of unrestricted punitive damages awards, such as $1,600,000, existing whenever an insurer litigates a contested claim, has a substantial "chilling effect" on the exercise of this fundamental right. This threat of unlimited punishment constitutes an oppressive influence on an insurer's decision whether to contest any claim. The dissent in *Standard Life v. Veal,* expressed its displeasure with this fundamental unfairness as follows:

> The Constitutional right of a litigant to defend a suit brought against him will be severely chilled,

> to say the least, if he is required to expose himself to the prospect that in the event he and his counsel should prove to be mistaken in their position and he loses, he will be assessed with punitive damages. This has never been the law in MIssissippi, and should never be.

354 So.2d at 252, 253.

Allowing a punitive damage award against Bankers Life because it chose to litigate the issue of coverage violates its due process rights and the rights of others similarly situated.

* * * * *

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 54,123

BANKERS LIFE AND CASUALTY COMPANY
Appellant

vs.

LLOYD M. CRENSHAW
Appellee

PETITION FOR REHEARING

Comes now Bankers Life and Casualty Company, pursuant to Rule 14 and petitions this Court for a rehearing on the appeal filed in this cause. Bankers Life submits that the Court has committed errors of law and fact in the majority opinion handed down on September 11, 1985, and in affirming the judgment in favor of the Appellee. The errors of law and fact and the distinct grounds for rehearing and reconsideration are as follows:

POINT 1

This decision was handed down on September 11, 1985. Less than one month prior, on August 14, 1985, the Court handed down *State Farm Fire & Casualty Co. v. Simpson*, Cause No. 54,606 (not yet published). The majority opinion in *Crenshaw* is manifestly in conflict with the law stated and applied in *Simpson* and *Blue Cross & Blue Shield of*

Miss. v. Campbell, 466 So.2d 833 (Miss. 1984). The majority opinion fails or refuses to apply, distinguish, overrule, *or even address* the applicable law established in *Simpson* and *Campbell.*

The majority opinion also completely ignores, and apparently overrules without notation, other recent Mississippi decisions holding that the proof must show gross, reckless or maliciously intentional conduct in order for punitive damages to be proper for breach of contract including a denial of an insurance claim. The majority opinion changes the law, deletes this requirement, and moves the burden to the insurer to prove that it had a justifiable or arguable basis for denying a claim. This decision creates a different and unequal standard for the application of punitive damages against insurers than other defendants and violates constitutional requirements of equal protection.

POINT 2

The Court's majority opinion fails to apply due process requirements of appellate review and assumes the role of an advocate in favor of the Appellee. The opinion goes completely outside the record to cross-examine and criticize the testimony and opinion of Dr. McParland. The opinion denies Bankers Life or any insurer the right to accept the opinion and advice of its own learned and qualified physician over the opinion of Plaintiff's physician. The opinion, *by lawyers,* denies Dr. McParland the right to disagree with the *opinions* of Dr. Westphal and Dr. Hockaday, *doctors,* even though *both doctors* testified that other physicians could reach other opinions.

POINT 3

The Court has failed or refused to consider Appellant's request for a review of the size of the verdict. The majority held "we are reviewing a matter which is by its very

nature committed to the sound discretion of the trial judge," and "where the trial judge acts upon these matters, we reverse only if the trial judge abuses or exceeds his discretion." (p. 50) The trial judge was indisputably under the mistaken belief that he had no authority to enter a remittitur of the punitive damage verdict. The failure to exercise any discretion is the same as an abuse of discretion. Bankers Life received no review at trial level, or on appeal, of its contention that the punitive damage verdict was excessive. The punitive damage verdict was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles. It is a fine or sanction with a purpose stated by the Court of punishment, but imposed without constitutionally mandated criminal safeguards and burden of proof.

POINT 4

The Court failed or refused to address or consider substantive legal reversible errors assigned as Errors D through F and argued and briefed by Bankers Life. The majority opinion does discuss the improper voir dire of Dr. McParland concerning medical malpractice suits but incorrectly states that Appellant "failed to favor us with any case in point." (p. 45) Authority directly on point is cited in Bankers Life's briefs. Further, the majority itself recognizes that "the mere fact that some person has been sued hardly effects either his reputation or credibility" (p. 46) verifying that the voir dire examination was not relevant and was solely for the purpose of creating bias and prejudice in the jury. It was utilized for this purpose by Crenshaw's attorneys in closing argument.

POINT 5

In arguing that Dr. McParland's opinion and testimony was not credible, the majority opinion incorrectly states, "As to the amputation site, Dr. Parland's [sic] first con-

tention, Dr. Westphal testified this site was chosen for function and that the fact the gangrenous condition had progressed far enough up the foot to indicate six inches below the knee was the safest place." (p. 42) In fact, Dr. Westphal testified, "in this situation, it was done to obtain better healing." (R. 711) The Court's clear error results from the analysis of the medical evidence far beyond the record and demonstrates the danger and error of the Court sitting as a medical review board utilizing authorities which with no medical witness was confronted.

POINT 6

The Court's majority opinion is plainly inconsistent on its face. It states that an insurance company faced with two separate and distinct medical theories should not have punitive damages assessed if it asserted in Court the theory favorable to its position even though the jury rejected the company's medical theory. Nevertheless, the majority, contrary to prior authority, refused to allow Bankers Life to rely on Dr. McParland rationalizing that he was not a disinterested witness. This holding and application is plainly contrary to decisions of the Mississippi Supreme Court in *Consolidated American Life Ins. Co. v. Toche,* 410 So.2d 1303 (Miss. 1982) and *Blue Cross v. Campbell;* decisions of the Fifth Circuit Court of Appeals in *Peel v. American Fidelity Assur. Co.,* 680 F.2d 374 (1982); and decisions of the United States District Court for the Northern District of Mississippi in *Horton v. Hartford Life Ins. Co.,* 570 F.Supp. 1120 (N.D. Miss. 1983) and *O'Connor v. Equitable Life Assur. Soc.,* 592 F.Supp. 595 (N.D. Miss. 1984).

POINT 7

The majority opinion erroneously asserts that Bankers Life asserted a different reason for denial of Crenshaw's claim at trial than given at the time of denial. This conclusion is completely refuted by the facts and specifically

the denial letters themselves which are quoted in Bankers Life's briefs.

WHEREFORE, PREMISES CONSIDERED, Bankers Life and Casualty Company, respectfully requests the Court to reconsider the majority opinion rendered in this cause, open the cause for additional hearing, briefs, and oral argument so as to allow Bankers Life to address the obvious errors of fact and law which have lead the majority to an unjust result, and to withdraw the opinion which has previously been rendered and substitute in its place the dissenting opinion.

Respectfully submitted,

/s/Charles G. Copeland
CHARLES G. COPELAND
J. TUCKER MITCHELL
Post Office Box 2132
Jackson, Mississippi 39225-2132

JOHN M. KINARD
MICHAEL J. MCELHANEY
Post Office Box 787
Pascagoula, Mississippi 39567

ATTORNEYS FOR APPELLANT, BANKERS LIFE AND CASUALTY COMPANY

OF COUNSEL:

COPELAND, COOK, TAYLOR AND BUSH
Suite 112 Capital Towers
Post Office Box 2132
Jackson, Mississippi 39225-2132
Phone: 601-354-0123

MEGEHEE, BROWN, WILLIAMS AND MESTAYER
Post Office Box 787
Pascagoula, Mississippi 39567

Phone: 601-762-2271

CERTIFICATE OF SERVICE

I, CHARLES G. COPELAND, do hereby certify that I have this day mailed a true copy of the above and foregoing Petition for Rehearing to ERNEST R. SCHROEDER, ESQ., BRYAN, NELSON, ALLEN, SCHROEDER AND BACKSTROM, 1103 Jackson Avenue, Post Office Drawer 1529, Pascagoula, Mississippi 29567, Attorneys for Appellee.

THIS, the 11th day of October, 1985.

/s/Charles G. Copeland
CHARLES G. COPELAND

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 54,123

BANKERS AND CASUALTY COMPANY

Appellant

vs.

LLOYD M. CRENSHAW

Appellee

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT 1

The majority opinion in *Crenshaw* is manifestly in conflict with the law stated and applied in *State Farm &*

Casualty Company v. Simpson, Cause No. 54,606 (not yet published) and *Blue Cross & Blue Shield of Mississippi v. Campbell,* 466 So.2d 833 (Miss. 1984). The following is quoted from *State Farm Casualty v. Simpson,* Judge Patterson writing for a unanimous Court:

> The term 'arguable reason' is now frequently before the Court. In *Blue Cross & Blue Shield of Miss. v. Campbell,* 466 So.2d 833 (Miss. 1984), concerning such statement, we held,
>
> We have come to term an insurance carrier which refused to pay a claim when there is no reasonably arguable basis to deny it as acting in 'bad faith,' and a lawsuit based upon such an arbitrary refusal as a 'bad faith' cause of action.
> 466 So.2d at 842.
>
> The term 'arguable reason' does not diminish the rule regarding the resolution of punitive damages because the assessment is no different in 'bad faith' cases than in other punitive damages cases. *Standard Life v. Veal, supra,* provides that punitive damages will not lie if the carrier has an arguable reason for denying the claim. *It does not necessarily follow, however, that punitive damages are mandated by the absence of an 'arguable reason.'* This is so because the denial of a claim could be the result of an honest mistake or oversight—ordinary or simple negligence—not reaching the heightened status of an 'independent tort' as set out in *Veal, supra,* and other cases.
>
> **THE ISSUE OF PUNITIVE DAMAGES**
>
> We are of the opinion the term 'legitimate or arguable reason,' although spawning much comment in our cases and in briefs and arguments of counsel, is nothing more than an expression indicating the act or acts of the alleged tortfeasor do not rise to the heightened level of an independent tort. Additionally,

> the very term expresses the holding of this Court establishing a distinction between ordinary torts, the product of forgetfulness, oversight, or the like; and heightened torts, which are the product of gross, callous or wanton conduct, or, if intentional, are accompanied by fraud or deceit. Lincoln Nat'l Life Ins. Co., *supra.*
>
> This is only to say that not all denied claims constitute *the gross, wanton or intentional conduct essential to the creation of an independent tort for which punitive damages will lie.* 'The mere fact that Lincoln rejected the claims under the provisions of its policy and defended the suit and lost does not justify imposition of punitive damages,' Lincoln National Life Ins. Co. v. Crews, 341 So.2d at 1322.

___So.2d at ___, (Emphasis Added)

In *Simpson* and *Lincoln National Life Insurance Co. v. Crews*, 341 So.2d 1321 (Miss. 1977), this Court makes it clear that a denial of a claim, even negligently, does not alone justify punitive damages. An arguable reason precludes punitive damages. "It does not necessarily follow, however, that punitive damages are mandated by the absence of an 'arguable reason'." Just as in areas outside insurance, a "heightened tort" is required.

Compare the irreconcilable language of the majority in *Crenshaw* handed down less than thirty days later:[1]

---

[1] The language on page 46 of the opinion indicates that the majority opinion was circulated on May 23, 1985, prior to the August 14, 1985, rendition of *State Farm v. Simpson.* Nevertheless any rationalization that the *Crenshaw* decision preceds the *Simpson* decision would be illogical and would intentionally forever trap *Crenshaw* as an inconsistent aberration from the logic, justice, and reason followed in *Blue Cross v. Campbell* and *State Farm v. Simpson.* More pointedly, it would give the appearance of a conscious effort by the Court to intentionally deviate from the line of established authority in order to reach a particular intended result, only to quickly return to the established line of

> The Fifth Circuit Court of Appeals in two cases has interpreted our holding in *Veal* to mean that if the carrier offers no justifiable reason or arguable basis under Mississippi law for denying a valid claim, the issue of punitive damages must be submitted to the jury. *Black v. Fidelity & Guaranty Ins. Underwriters*, 582 F.2d 984, 990-991 (5th Cir. 1978); *Vogel v. American Warranty Home Services Corp.*, 695 F.2d 877 (5th Cir. 1983).
>
> We think this is a sound interpretation of *Veal.* Surely, if a justifiable reason or an arguable basis for denying a claim exists, the insurance company is under *a duty to assert* it; however, *without that foundation the requisite intent or gross negligence necessary for the recovery of punitive damages may reasonably be inferred.*

(pp. 32-33) (Emphasis Added)

In *Crenshaw* the majority has now held that "punitive damages are mandated by the absence of an arguable reason." The opinion further places the burden of an insurer to avoid punitive damages—"a duty to assert" an arguable reason.

This Court handed down the decision of *Blue Cross v. Campbell* in December, 1984 and rendered a decision on the Petition for Rehearing in April, 1985. Both opinions were written by Judge Hawkins for the Court. The following quotes are taken from these opinions:

> The uncontradicted testimony in this case is that the Blue Cross medical staff reviewed this claim and came to the conclusion, from the *records submitted,*

---

authority by a case which was actually handed down prior in time. When *Crenshaw* was handed down *Simpson* had already been handed down and the Court knew the law explained and applied in *Simpson.*

this claim was excluded under the policy. Where is there any proof they acted arbitrarily or with caprice?

. . .

Strong argument is made about Dr. Yeldell's testimony at trial. It is not what Dr. Yeldell testified *at trial*, however, which is determinative of Blue Cross's bona fide questioning of Campbell's claim, but what Dr. Yeldell had written on the hospital medical records. Blue Cross had only the medical records before it when it denied the claim.

. . .

Any plaintiff asking for punitive damages, or any special or extraordinary damages based upon 'bad faith' of an insurance company has a heavy burden.

. . .

It can be argued with considerable persuasion that unless the trial judge grants a directed verdict to the insured plaintiff on the contract claim, then, as a matter of law, the insurance carrier has shown reasonably arguable basis to deny the claim; and therefore, the carrier should never be subjected to the possibility of punitive damages based upon 'bad faith.'

There is compelling logic behind this argument and this would certainly appear to be true in the vast majority of cases. This criterion should ordinarily determine the answer to the question.

. . .

As we have stated, the plaintiff has a heavy burden to demonstrate to the trial court that there was no reasonably arguable basis for the insurance carrier to deny the claim. Unless he so demonstrates, the trial court as a matter of law is under a duty to remove any punitive damages claim based upon bad faith from

> consideration by the jury. The defendant insurance carrier is then entitled to a directed verdict on any 'bad faith' claim.

In *Simpson* Judge Patterson quoted *Blue Cross v. Campbell* and also stated:

> In our best judgment the preceding conclusions properly decide this case under its facts and our law. However, other words in the nature of obiter dictum seem appropriate. *A great majority of punitive damage cases should be ended by the trial court's refusal of a peremptory instruction for the plaintiff.* This is to say if the plaintiff is not entitled to a peremptory instruction, it *logically follows that a punitive damage instruction should be refused.* The refusal of the peremptory instruction indicates there are factual issues to be resolved by a jury and because of this it follows that the alleged tortfeasor has a logical reason for denying the claim, thereby prohibiting the granting of a punitive damage instruction.

___So.2d at ___. (Emphasis Added).

It is undisputed that the issue of whether Crenshaw's amputation resulted solely from disease or from a combination of disease and accident was properly submitted to the jury. It is undisputed that arteriosclerosis at a minimum played the major part in the causation of the amputation. It is undisputed that Dr. McParland was of the opinion that the amputation was due *solely* to disease. It is undisputed that Dr. McParland felt he could make this diagnosis based upon the records which he had. It is undisputed that Dr. Westphal testifying for Crenshaw testified that Crenshaw's amputation "may or may not have happened" solely from disease and that he did not think that anyone "could say with a hundred percent certainty what happened." (R.777)

The law as stated in *Simpson* and *Campbell* and the undisputed facts in *Crenshaw* simply cannot be reconciled with the majority opinion. Yet *Simpson* and *Campbell* are not overruled or discussed. The *Crenshaw* decision conflicts with the Court's established law and reasoning and the decision should be withdrawn and the dissenting opinion adopted by the majority. The prior decisions of this Court in bad faith cases are based upon considered opinions of numerous judges and should not be lightly abandoned nor ignored nor conveniently bent to reach an intended result. These prior decisions are *not* wrong, *Crenshaw* is wrong and should be corrected.

* * * * *

* * * * *

POINT 3

At the hearing in the lower court on Motion for Remittitur, counsel for Bankers Life argued to the trial judge that the amount of punitive damages awarded against Bankers Life was excessive and a remittitur should be entered. Counsel argued to the lower court that it was the lower court's obligation to review the size of the verdict at that time (R.1233) and explained the factors to be considered in determining if a verdict for punitive damages is excessive. (R.1233-1240) When Appellant's counsel concluded his argument, Judge Lockhard stated:

> [T]he Mississippi Supreme Court recently . . . in a fairly recent case said that the trial court has no authority whatsoever to reduce or alter punitive damages. . . . The Supreme Court said I have no such authority. They are either there or they are not. The trial court cannot tamper with them. We can amend and, of course, add additurs and remittiturs to actual damages, but not to punitive. That's the position of our Supreme Court. (R.1243)

. . .

But anyhow, I don't have the authority to change the puntive damages. I think its a case that merited punitive damages, and you can properly argue the amounts to the Supreme Court. So, I overrule—
(R.1245) (Emphasis Added).

An Order overruling Bankers Life's Motion for Remittitur was subsequently entered. (R.1250) Thus, the lower court did not hear and expressly indicated that it would not consider Bankers Life's argument that the amount of punitive damages imposed against it was excessive, citing an alleged recent Mississippi Supreme Court decision.

In discussing the issue of excessiveness of punitive damages, this Court stated in its majority opinion as follows:

> Our general rule is that a damage award is so excessive that it should be altered or amended when it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience. (p. 49)
>
> . . .
>
> Where this test is met, the trial judge is authorized generally to enter a remittitur or an additur as may be appropriate under the facts and circumstances of the particular case. [Miss. Code Ann. §11-1-55 (Supp. 1984)]. This authority to enter a remittitur or an additur exists where the nature of the damage award at issue is punitive or exemplary. See *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d 239, 249 (Miss. 1977) (rule impliedly recognized). We hold that motions challenging the quantum of punitive damages and seeking either a remittitur or an additur are subject to the same rules as motions challenging the amount of damage awards generally. *This means that on appeal we are reviewing a matter which is by its very nature committed to the sound discretion of the trial judge.* See *Jesco, Inc. v. Whitehead,* 451 So.2d

> 706, 714-716 (Miss. 1984) (Robertson, J., concurring). What in essence we are dealing with is a motion for a remittitur or in the alternative for a new trial on the issues of damages only. *Where the trial judge acts upon these matters, we reverse only if the trial judge abuses or exceeds his discretion. Dorris v. Carr,* 330 So.2d 872, 874 (Miss. 1976).
> (p. 49-50) (Emphasis Added)

The trial court stated that it had no authority to enter a remmittitur on the amount of punitive damages and the Supreme Court stated that it would not review the amount of punitive damages unless the trial court abused its discretion. The end result is that Bankers Life is not heard by either Court. In other words, Bankers Life never had its day in court on the issue of excessiveness of punitive damages. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. A deprivation of these rights violates the Fifth and Fourteenth Amendments of the U. S. Constitution. Such due process rights mandate that judicial proceedings give the parties opportunities to be heard on allegations and defenses and to present argument on legal issues.

Review of the size of the verdict "is by its very nature committed to the sound discretion of the trial judge." This was not done and a serious error has occurred. No glossing over of this error by a meaningless distinction between judicial conscience and the conscience of the members who make up the court will cure or heal the error which results in a payment of $1,6000,000. Nor will the protest that its not our job. "What he might have done had he been required to maturely reflect upon the matter we cannot know." (Hawkins Dissent, p. 6)

The Jackson County jury and the effect of the majority opinion are like the child in the cookie jar—once in they are going to eat a substantial amount without regard to

what is necessary to accomplish proper objectives: punishment, example, reward. What's needed has become lost in favor of what's available. There is no rational relationship between the size of the punitive damage verdict and any legitimate purpose. It is excessive, constitutes an excessive fine, and violates due process, equal protection and other constitutional standards.

* * * * *

POINT 4

CONCLUSION

The majority opinion is unjust. It is an aberration from the line of law our Court has been negotiating and expanding since *Veal v. Standard Life.* If it becomes final, it will not stand the test of time no more than was *Reserve Life v. McGee* which also deviates from logic and justice. The deviation from course will eventually be condemned for what it is and corrected by later decisions or, if necessary, by statute. But what of Bankers Life and the $1,600,000? Will the judgment be undone six months or one year later? Will the money be returned? Bankers Life can absolutely absorb the judgment and pass it along to policyholders but will justice have been done? Will the public policy of Mississippi have been served? Lloyd Crenshaw and his attorneys will undoubtedly be secured but what of thousands of other Mississippi policyholders? What must they suffer so that Lloyd Crenshaw and his attorneys become so financial secure? The penalty applied is much too severe for any supposed offenses of Bankers Life. The impact upon the claims departments will be strong, but the impact will even be stronger upon the underwriters, the actuaries, the accountants, and the availability of insurance at reasonable cost.

Bankers Life can write the check, but the public is going to ultimately pay the bill. The fine is both unjust and

excessive. Its result cannot be rationally justified for any reasonable purpose.

Respectfully submitted,

/s/Charles G. Copeland
CHARLES G. COPELAND
J. Tucker Mitchell
Post Office Box 2132
Jackson, Mississippi 39225-2132

JOHN M. KINARD
MICHAEL J. McELHANEY
Post Office Box 787
Pascagoula, Mississippi 39567

ATTORNEYS FOR APPELLANT, BANKERS LIFE AND CASUALTY COMPANY

APPENDIX I

IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI

No. 18,556

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE

Plaintiff

vs.

EDWARD BRISTOW

Defendant

SPECIAL INTERROGATORIES

You, the jury should answer the rest of the questions in sequence as instructed here. Please answer the first two questions:

1. Do you believe based upon a preponderance of the evidence that Mr. Bristow was able to perform any [type of] occupation [or profession] for which he was reasonably suited by education, training or experience on March 9, 1982?

YES ------

NO --✓--

2. Do you believe based upon a preponderance of the evidence that Mr. Bristow is able to perform any [type of]

occupation [or profession]* for which he is reasonably suited by education, training or experience now?

YES ——————

NO ——✓——

If you answer both questions 1 and 2 above yes, then you should not consider any further questions and you should return these questions as your verdict. If you answer question No. 1 above NO, then you should answer the following question.

3. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennessee had an arguable or legitimate reason for terminating Mr. Bristow's benefits on March 9, 1982?

YES ——————

NO ——✓——

If you answer YES to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If your answer is NO, then you should answer the following question.

4. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennesse's termination of benefits constituted a willful and intentional wrong *or* constituted such gross or reckless negligence as to be equivalent to such a wrong?

YES ——✓——

---

* The bracketed words appeared in the draft Special Interrogatories to the jury submitted to the court by appellant. The court deleted the bracketed words before the Special Interrogatories were submitted to the jury for its responses and verdict.

NO------

If you answer NO to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If you answer YES, then you *may* in your discretion award damages as *otherwise* instructed by the court and the form of your verdict shall be in the following form:

> We, the jury, find for Edward Bristown in the amount of $ ____ actual damages.
>
> or
>
> We, the jury, find for Edward Bristow in the amount of $50,000.00 actual damages and $6,000,000.00 punitive damages.

Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS LIFE AND CASUALTY CO.
Appellant,

v.

LLOYD M. CRENSHAW
Appellee.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

J. P. JANETATOS
BAKER & MCKENZIE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290

Counsel of Record
for the Appellee

Of Counsel:

ERNEST R. SCHROEDER
VINCENT J. CASTIGLIOLA, JR.
JOHN A. BANAHAN
BRYAN, NELSON, ALLEN,
SCHROEDER, & BACKSTROM
1101 Jackson Avenue
Post Office Drawer 1529
Pascagoula, Mississippi 39567
(601) 762-6631

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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CONSTITUTIONAL PROVISIONS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1765

BANKERS LIFE AND CASUALTY CO.

Appellant,

v.

LLOYD M. CRENSHAW

Appellee.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

Pursuant to 28 U.S.C. § 1257(2) (1986) and Rule 16.1(b) of the Rules of the Supreme Court of the United States, the Appellee, Lloyd M. Crenshaw, hereby moves to dismiss this appeal on the grounds that the federal questions sought to be reviewed were neither timely nor properly raised before the Circuit Court of Jackson, Mississippi, or the Supreme Court of Mississippi. In addition, the questions presented are not substantial federal questions appropriate for review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1257 (1986) provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

2. Rule 16.1(b) of the Rules of the Supreme Court of the United States provides that:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis.

3. Rule 6 of the Rules of the Mississippi Supreme Court provides in part that:

> (a) The appellant shall file an assignment of error on or before the due date of appellant's brief. . . . The assignment of errors shall set out separately and particularly each error asserted and intended to be urged. . . .

> (b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

4. *Miss. Code Ann.* § 11-7-59(4) (1972) stated in pertinent part:

> If the defendant desire to prove, by way of defense in an action, any affirmative matter in avoidance, which by law may have been proved heretofore under special plea he shall set forth in his answer to the action such affirmative matter and incorporate such defense therein, otherwise such matter shall not be allowed to be proved at trial.

5. *Miss. Code Ann.* § 83-17-1 (1972) provides in pertinent part:

> [An insurance agent] knowingly procuring, by fraudulent representations, payment or the obligation for the payment of a premium of insurance shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not more than one year.

STATEMENT OF THE CASE

The Appellee, Lloyd M. Crenshaw ("Crenshaw"), generally agrees with the statement of the case provided in the Jurisdictional Statement of the Appellant, Bankers Life and Casualty Company ("Bankers Life"). The Appellee, however, would like to correct certain misstatements and omissions therein.

Bankers Life claims that it rejected Crenshaw's claim on the basis that "the limb loss was due to severe arteriosclerosis and was therefore not an 'accidental' loss covered by the policy." Jurisdictional Statement, 6. In fact, as pointed out by the Mississippi Supreme Court, Bankers Life denied Crenshaw's claim on the basis that Crenshaw's insurance policy contained a provision which stated that for an injury to be covered it must be "caused directly and independently of all other causes and effected solely through an accidental bodily injury." Jurisdictional Statement, App. A, 34a. Furthermore, the Mississippi Supreme Court stated that:

> Despite the consistent holdings of this court that such a policy provision would not have prevented Crenshaw from recovery had the trauma to his foot played any part in the loss of his limb, Bankers Life at all times prior to trial denied coverage for this reason . . . in all correspondence to Crenshaw or his representatives, and after suit was filed in the answer to the interrogatories.

Jurisdictional Statement, App. A, 34a.

The Mississippi Supreme Court noted in its review of this case that "Bankers Life's handling of this claim prior to trial is a striking example of how an insurance company claim should not be handled." Jurisdictional Statement, App. A, 32a. The Court further stated that "Bankers Life denied [Crenshaw's] claim and gave as a reason therefore an exclusion under the policy which its executive personnel knew was invalid under Mississippi law." Jurisdictional Statement, App. A, 33a-34a.

Finally, the Mississippi Supreme Court stated that:

> Conduct such as exemplified by Bankers Life in this case is harmful to the insured public. The company violated standards of conduct enunciated by this Court. It grossly violated its own in-house procedure for investigating a claim. Its executive personnel had to realize that a full and complete investigation posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had absolutely nothing to do with the loss of limb. Yet they simply denied the claim for an invalid reason, especially deceptive in this case, because *on the surface* and to the uninitiated it appeared valid. . . .

Jurisdictional Statement, App. A, 46a-47a (emphasis in original).

After a complete review of the record, the Mississippi Supreme Court affirmed the jury verdict of the Circuit Court of Jackson, Mississippi, which assessed $20,000 compensatory damages and $1,600,000 punitive damages against Bankers Life.

ARGUMENT

I. The Federal Questions Were Not Timely Or Properly Raised In The Court Below

A. The Challenge to *Miss. Code. Ann.* § 11-3-23 Was Not Timely Raised In The Courts Below

Rule 16.1(b) of the Rules of the Supreme Court of the United States states that a motion to dismiss will be received on the ground that "the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on" by the court

below. In the instant case, Bankers Life first challenged the constitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982) in its petition for rehearing before the Mississippi Supreme Court. Bankers Life's challenge to Section 11-3-23, therefore, is not properly before this Court because it was not timely raised before the state courts of Mississippi.

In general, federal questions "first presented to the highest State court on a petition for rehearing come too late for consideration [before the United States Supreme Court]." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945). There are instances, however, when a federal question brought for the first time on rehearing before a state court may be properly appealed to the United States Supreme Court. "Federal claims . . . have been adequately presented [to the Supreme Court] even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980). *See also Great Northern Railway v. Sunburst Oil & Refinery Co.*, 287 U.S. 358, 366-67 (1923); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Bankers Life asserts that its challenge to Section 11-3-23 was timely in that "there was no issue concerning the statute" until the Mississippi Supreme Court affirmed the order of the trial court. Jurisdictional Statement, 9. This assertion is specious. Bankers Life knew that the statutory penalty was mandatory and would be assessed if the case were affirmed without modification.[1]

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[1] As the Mississippi Supreme Court noted in 1983:

The practice of the Mississippi Supreme Court, when faced with challenges to Section 11-3-23, is consistent with this general rule. The statutory penalty prescribed by Section 11-3-23 is mandatory and must be imposed if the decision below is affirmed without modification. *Old Security Casualty Insurance Co. v. Clemmer*, 458 So. 2d 732, 733 (Miss. 1984); *Collins v. North Mississippi Savings and Loan Ass'n*, 445 So. 2d 828, 831-32 (Miss. 1984).

In fact, only when the mandatory penalty is *not* imposed has the Mississippi Supreme Court entertained a challenge upon rehearing. *See Wallace v. Jones*, 360 So. 2d 932 (Miss. 1978); *see also Old Security Casualty Insurance Co. v. Clemmer*, 458 So. 2d at 733 (Miss. 1984). Thus, the failure to impose the mandatory penalty is an "unexpected interpretation" of the law, and consideration upon rehearing in such an instance is quite proper.

Under the clear language of the statute, a decision to impose the penalty cannot be termed "unexpected," especially where, as in this case, no challenge to the statute was presented before the decision was rendered.

The practice of the Mississippi Supreme Court when faced with challenges to Section 11-3-23 upon re-

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> Every losing litigant is given an automatic right of appeal. When deciding whether to exercise that right, the penalty statute is there for him to consider. If he is successful on his appeal, of course, he incurs no penalty. *If he loses, however, he must pay the price, a price he well knows and may easily calculate before giving his notice of appeal.*

Walters v. Inexco Oil Co., 440 So. 2d 268, 275 (Miss. 1983) (emphasis supplied).

hearing, therefore, is consistent with the general rule. The Mississippi Court will entertain challenges to the statute or its implementation upon rehearing when its initial decision is somehow unexpected or is a reversal of a previous interpretation. In the instant case, however, the Mississippi Court's decision was neither unexpected nor a reversal of a previous interpretation.

The action of the Mississippi Supreme Court in refusing to consider Bankers Life's challenge may be reconciled with the decision of this Court in *Hathorn v. Lovorn*, 457 U.S. 255 (1982). In *Hathorn*, this Court found that the Mississippi Supreme Court erred in refusing to consider a federal question brought before it upon rehearing, and thereby held that "there are no independent and adequate state grounds barring our review of the federal issue." 457 U.S. at 265.

In so finding, the Court stated that *Hathorn* involved issues that "could have [been] forseen but that arose with urgency only after the court upheld part of a challenged statute." 457 U.S. at 264. Stated differently, in *Hathorn*, this Court found that the Mississippi Supreme Court issued an "unexpected interpretation" by upholding a state statute *which was challenged upon appeal.* Once that decision was rendered, a federal constitutional issue arose with some "urgency," and the federal issue was therefore properly presented upon the petition for rehearing. *See e.g., PruneYard Shopping Center v. Robins*, 447 U.S. at 85 n.9 (1980).

In addition, in *Hathorn* the Court found that the Mississippi Supreme Court could not rely on a state procedural rule which precludes hearing issues first presented on rehearing since that rule was inconsistently applied. 457 U.S. at 263 (*citing Barr v. City of*

Columbia, 378 U.S. 146, 149 (1964)). The Court's holding in *Hathorn*, however, may only apply to those instances in which the Mississippi Supreme Court renders an unexpected interpretation of state law or reverses a prior interpretation. As this Court noted in *Hathorn*, the Mississippi Supreme Court has, in the past, reviewed federal issues first brought on rehearing in instances where it has issued an unexpected interpretation of state law or has reversed a prior interpretation. 457 U.S. at 264; (*citing Quinn v. Branning*, 404 So. 2d 1018 (1981)). The Mississippi Supreme Court's refusal to review the federal issue in *Hathorn*, therefore, was an inconsistent application by that court of the state procedure allowing issues to be brought for the first time upon rehearing when, as a result of the Mississippi Supreme Court's decision, the issue arises, and is anticipated by the parties, for the first time.[2]

In the instant case the Mississippi Supreme Court did not issue an unexpected interpretation of state law when it assessed the fifteen percent penalty. In fact, the assessment was mandatory and in accordance with the plain language of the statute. Bankers Life, therefore, was fully aware of this issue when it

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[2] In *Hathorn*, this Court stated that "The Mississippi Supreme Court now regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions." 457 U.S. at 263 (footnote omitted). The Court supports this assertion by citing a number of Mississippi cases which granted petitions for rehearing. 457 U.S. at 263 n.14. A study of these cases indicates, however, that in each instance the petition was granted due to *factual* oversights by the Mississippi court. In none of the cases cited did the Mississippi court grant a petition for rehearing in order to consider a *legal* issue raised for the first time in the petition.

submitted its notice of appeal. *See Walters v. Inexco Oil Co.*, 440 So. 2d at 275 (Miss. 1983), *supra* note 1. As such, Bankers Life cannot state that the decision to assess the penalty was unexpected or a reversal of a prior interpretation.

Based on the foregoing, Bankers Life's challenge to Section 11-3-23 was not timely brought before the Mississippi Supreme Court, and this appeal should be dismissed pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States.

B. Bankers Life's Due Process Challenge Was Not Timely or Properly Presented in the Courts Below

1. The Challenge Was Not Properly Presented to the Mississippi Supreme Court

In the decision below, the Mississippi Supreme Court made no express reference to Bankers Life's "due process" challenge to the punitive damages award. In general, this Court has held that when a state court has not expressly passed upon a federal question presented to it, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969)(citations omitted). In the absence of such an affirmative showing, the issue will not be reviewed for the first time in the United States Supreme Court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Webb v. Webb*, 451 U.S. 493, 495-96 (1981).

Bankers Life has not met its burden of showing that the failure of the Mississippi Supreme Court to address the due process issues was due to a reason other than want of proper presentation. In fact, the

record indicates that want of proper presentation was precisely the reason that the Mississippi Supreme Court did not pass upon the question.

Rule 6 of the Rules of the Mississippi Supreme Court states that an Appellant must assign as error the *specific* issues to be argued on appeal:

> (a) . . . . The assignment of errors shall set out separately and particularly each error asserted and intended to be urged.
>
> (b) *No error not distinctly assigned shall be argued by counsel*, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Miss. Sup. Ct. R. 6 (emphasis supplied). The Mississippi Supreme Court strictly applies Rule 6, and does not consider appeals not specifically assigned in the assignment of errors. *Harkins v. Paschall*, 348 So. 2d 1019, 1024 (Miss. 1977); *Dorroh v. Cotten*, 259 So. 2d 121, 123 (Miss. 1972). *See also Overstreet v. Allstate Insurance Co.*, 474 So. 2d 572, 577 (Miss. 1985). In addition, the plain language of the rule indicates that an appellant cannot cure a defect in the assignment of errors by presenting a more specific argument in the brief.

In the instant case, Bankers Life's Assignments of Error to the Mississippi Supreme Court, attached hereto as Appendix A, do not set out the due process challenge with the required specificity. The assignment simply states that "[t]he award of punitive damages violates Appellant's due process rights." App. A, 2a. The assignment does not specify whether it refers to due process rights arising under the Mis-

sissippi or the United States Constitution. In addition, the assignment does not specify that it was the *excessiveness* of the punitive damage award that allegedly violated some unidentified due process right. Upon reading the assignment of error, it appears that Bankers Life was challenging *any* award of punitive damages, regardless of the amount of the award. It is entirely reasonable to assume, therefore, that in light of the lack of specificity of the assignment of error the Mississippi Supreme Court merely applied Rule 6 and refused to entertain the issue.

The Mississippi Supreme Court's refusal to entertain the issue is consistent with decisions of this Court. In *Webb v. Webb*, 451 U.S. 493, 495-96 (1981), the appellant appealed a decision of the Georgia Supreme Court. Before the Georgia court, the appellant had alleged violations of the principle of full faith and credit. This Court, however, refused to allow an appeal because the full faith and credit claim had never been passed upon by the state Supreme Court. 451 U.S. at 495.

In *Webb*, the appellant argued that, despite its failure to specifically refer to the full faith and credit clause of the United States Constitution, it had used the phrase "full faith and credit." The appellant argued that, since the Georgia Constitution has no full faith and credit clause, the appeal below obviously referred to the United States Constitution. 451 U.S. at 496. This Court, however, disagreed, stating that the Georgia Supreme Court, even in the absence of a state constitutional provision, could have interpreted the appellant's challenge as one directed at *state* law. *Id.*

In the instant case, Bankers Life's reference to the federal Constitution is even less specific than that in *Webb*. The Mississippi Constitution does include a due process clause. Miss. Const. art. 3, § 14. Moreover, Bankers Life's Brief before the Mississippi Supreme Court cites state law to support its contention that the award of punitive damages has a "chilling effect" on the "fundamental right of access to the courts." App. B, 4a-5a. Specifically, the brief cites sections 24 and 25 of article 3 of the Mississippi Constitution and a Mississippi Supreme Court case, *Standard Life Insurance Co. of Indiana v. Veal*, 354 So. 2d 239 (Miss. 1978). *Id.*

In light of the lack of specificity in Bankers Life's assignments of error it is entirely reasonable to assume that the Mississippi Supreme Court might have construed this as a challenge under the *state* constitution, and that because of the confusion, the court simply applied Rule 6 and refused to consider the issue because of the lack of specificity.

The facts of this case indicate that Bankers Life's due process claims were not adequately presented in the court below, and that this want of proper presentation underlay the refusal of the Mississippi Supreme Court to address these issues. Since the due process issues were not properly presented below the appeal should be dismissed.

2. *The Due Process Challenge Was Not Properly Brought Before the Trial Court*

Bankers Life's due process challenge was not properly presented in the courts below since it was not properly presented to the Circuit Court of Jackson County, Mississippi.

(a) The Appellant Did Not Include Its Constitutional Challenge To The Claim For Punitive Damages In Its Affirmative Defense

Miss. Code Ann. § 11-7-59(4) (1972), which was in effect as of the time of the trial in this case, stated that:

> If the defendant desire to prove, by way of defense in an action, any affirmative matter in avoidance, which by law may have been proved heretofore under special plea he shall set forth in his answer to the action such affirmative matter and incorporate such defense therein, otherwise such matter shall not be allowed to be proved at trial.

Bankers Life's Answer in the trial court, attached hereto as Appendix C, contained mere general denials of the allegations of the Declaration. There were no affirmative defenses raised in the Answer, and the Answer contained no references to any constitutional issues.

Under the terms of Section 11-7-59, therefore, the constitutional issues were never properly raised before the trial court, and could not have been argued before that court. The Supreme Court of Mississippi has consistently refused to consider on appeal defenses which were not alleged or argued at trial. *Cain v. Mid-South Pump Co.*, 458 So. 2d 1048, 1051 (Miss. 1984); *Dobbs-Maynard Co., Inc. v. Jumper*, 388 So. 2d 879, 883 (Miss. 1980); *Memphis Bank & Trust Co. v. Pate*, 362 So. 2d 1245, 1250 (Miss. 1978).

In addition, state and federal constitutional questions which are not raised in the lower court will not be reviewed by the Mississippi Supreme Court. *Stew-*

art v. City of Pascagoula, 206 So. 2d 325, 328 (Miss. 1968); *State v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So. 2d 257 (1963); *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

The Mississippi Supreme Court, therefore, could not review any constitutional issues raised since such issues were not included in the Appellant's affirmative defense before the trial court.

(b) The Constitutional Challenges Were Not Included In The Motion For New Trial

In Mississippi, an issue is not timely or properly presented to the Mississippi Supreme Court unless it has been first included in a motion for new trial and passed on by the trial court. An assignment of error to the State Supreme Court that was not included in the motion for new trial is deemed waived and will not be considered on appeal. *Mississippi State Highway Commission v. Rives*, 271 So. 2d 725, 729 (Miss. 1972); *Mercier v. Davis*, 234 So. 2d 902, 904 (Miss. 1970); *Briscoe v. Briscoe*, 255 So. 2d 313, 314 (Miss. 1971).

In the instant case the Motion for New Trial, attached hereto as Appendix D, does not challenge the jury's award of punitive damages based on a denial of rights under the Due Process Clause of the United States Constitution. Rather, the Motion merely states that "[t]he verdict of the jury was so excessive as to evidence bias, passion and prejudice against the Defendant." App. D, 11a. Such imprecise language does not constitute a due process claim under the Constitution of the United States. *See Webb v. Webb*, 451 U.S. 493, 496 (1981). Thus, the trial court was not presented with the opportunity to reach the con-

stitutional issue of whether the award of punitive damages violated the Eighth Amendment of the United States Constitution, the Contract Clause of the United States Constitution, or the Due Process Clause of the United States Constitution.

Under the law of Mississippi, therefore, the Mississippi Supreme Court could not have reviewed Bankers Life's due process claims since they were neither timely nor properly presented before the trial court.[3]

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[3] In this context, Bankers Life's statements to the effect that it "first challenged the excessiveness of the punitive damage award in its post-trial motions," Jurisdictional Statement, 10, and that the challenge "was renewed on direct appeal to the Supreme Court of Mississippi," Jurisdictional Statement, 11, are, at best, disingenuous. The basis of Bankers Life's challenge in each court has been different. Before the trial court Bankers Life claimed "bias" on the part of the jury. App. D, 11a. In its assignments of error to the Mississippi Supreme Court Bankers Life claimed that the award of punitive damages violated its "due process" rights. App. A, 2a. In its brief before the Mississippi Supreme Court and in the Motion for Rehearing before the Mississippi Supreme Court, the basis for the challenge had become the "chilling effect" the punitive damage award had upon Bankers Life's "fundamental right" of access to the courts. Jurisdictional Statement, App. A, 135a. Now, before this Court, Bankers Life challenges the award on the basis of the Eighth Amendment and the Contract Clause of the United States Constitution.

In this case, the courts below have had no opportunity to rule on the issues presented by the Appellant because Bankers Life has made different arguments to each court. An issue cannot be properly presented in the courts below if the issues change at each level of appeal. It is obvious that, in the instant case, the courts below have never had the opportunity to rule on the issues that Bankers Life has raised at the next level of review. In all probability, this is why the Mississippi Supreme Court

Under the terms of Rule 16.1(b) of the Rules of the Supreme Court, therefore, this appeal should be dismissed.

II. The Appeal Does Not Present A Substantial Federal Question

Neither of the questions contained in the Appellant's Jurisdictional Statement presents a substantial federal question worthy of review by this Court. Accordingly, the appeal should be dismissed under Rule 16.1(b) of the Rules of the Supreme Court.

A. *Miss. Code Ann.* § 11-3-23 Is Constitutional

1. *Purpose of Miss. Code Ann. § 11-3-23*

Miss Code Ann. § 11-3-23 (Supp. 1982) provides for a fifteen percent penalty to be assessed upon any appellant who unsuccessfully appeals a money judgment. As the Supreme Court of Mississippi explained in *Walters v. Inexco Oil Company*, 440 So. 2d 268 (Miss. 1983), the statute has two purposes. "The penalty statute expresses the state's interests in discouraging frivolous appeals. It likewise expresses a bona fide interest in providing a measure of compensation for the successful appellee." 440 So. 2d at 274.

2. *Miss. Code Ann. § 11-3-23 Does Not Violate the Equal Protection Clause*

Section 11-3-23 accomplishes its purpose through the assessment of the fifteen percent penalty. The statute does not violate the Equal Protection Clause of the United States Constitution since it has general

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refused to entertain the Appellant's due process claims. The want of proper presentation below warrants a similar refusal in this Court.

application to all litigants. In addition, the penalty bears a rational relationship to the purpose of the statute.

In *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), this Court stated that "[w]hen an appeal is afforded, . . ., it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." Section 11-3-23 does not capriciously or arbitrarily deny Bankers Life access to appeal in the State of Mississippi.

First, the statute has general application to all litigants appealing from a money judgment. The penalty applies equally to Bankers Life as it does to a plaintiff dissatisfied with a money judgment who appeals and whose judgment is affirmed. *Antley v. Mississippi State Highway Comm'n*, 318 So. 2d 847, 851 (Miss. 1975); *Pearce v. Ford Motor Co.*, 235 So. 2d 281, 283 (Miss. 1970); *Eagle Lumber and Supply Co. v. Robertson*, 161 Miss. 17, 135 So. 499, 500 (1931).

Second, the penalty statute does not present a prior bar to appeal. It is only assessed after the fact of the appeal. Therefore, an unsuccessful litigant has no monetary barrier which must be cleared *before* filing a notice of appeal.

Third, the assessment of only a fifteen percent penalty is rationally related to the purpose of compensating appellees forced to bear the expense of an unwarranted appeal while discouraging appellants such as Bankers Life from prosecuting unwarranted appeals.

For example, during the pendancy of this appeal, prevailing interest rates provided an economic incentive for appellants such as Bankers Life to delay the imposition of a judgment by any means possible, in-

cluding appeal. Bankers Life was able to retain the use of money owed as a result of the judgment below for a period of four years between 1981 and 1985. Between 1981 and 1984 the interest rate, as evidenced by the effective rate paid for federal funds, ranged from 16.38 percent in 1981 to 10.23 percent in 1984. U.S. Dep't of Com., Bur. of the Census, Statistical Abstract of the United States 1986 (106th ed.) Table No. 853 ("Money Market Interest Rates: 1970 to 1985"), at 505. The statutory rate of interest applied to Crenshaw's award in this appeal, however, was only eight percent. Jurisdictional Statement, 102a. Without the fifteen percent penalty, appellants such as Bankers Life would have an economic incentive to delay the imposition of a judgment as long as possible, including by appeal, merely to take advantage of the difference in interest rates. The fifteen percent penalty of Section 11-3-23, however, removes this economic incentive to appeal.

Fourth, the statute is narrowly drawn so that the penalty does not discourage meritorious appeals. The penalty applies only in those cases when the judgment of the trial court is affirmed *without modification*. If the Mississippi Supreme Court finds that *any* portion of the appeal is meritorious, and modifies the judgment of the trial court in *any* way, the penalty statute does not apply. *Old Security Casualty Insurance Co. v. Clemmer*, 458 So. 2d 732, 733 (Miss. 1984).

3. *Section 11-3-23 Is Consistent With The Decisions Of This Court*

Section 11-3-23 is consistent with the decisions of this Court. In *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court held that a provision of the Oregon Forcible Entry and Wrongful Detainer Statute ("FED")

which required the posting of a double bond before appeal, violated the Equal Protection Clause. 405 U.S. at 74-79. The statute at bar in *Lindsey*, however, is easily distinguishable from Section 11-3-23.

First, the *Lindsey* statute applied only to *tenants* seeking to reverse an action taken under one particular statute. 405 U.S. at 79. Such is not the case with Section 11-3-23. Section 11-3-23 has general application to *all* litigants who appeal from a money judgment. Therefore, it does not create a class of persons unable to exercise an opportunity to appeal.

Second, it is significant to note that in order to appeal a civil case in Oregon, a litigant was required to file a bond equal to the amount of the award plus the anticipated costs of the appeal. 405 U.S. at 74. In comparing the double bond requirement of the FED to the general requirement, this Court stated that "[s]imilar conditions on the tenant's right to appeal, such as those imposed by [the general requirement] would . . . raise no serious constitutional questions." 405 U.S. at 76. In *Lindsey v. Normet*, therefore, this Court implicitly stated that a narrowly drawn bonding requirement or penalty statute does not violate the Equal Protection Clause.

Section 11-3-23 is even less restrictive than the Oregon general bonding requirement implicitly approved in *Lindsey*. Section 11-3-23 does not require the posting of a bond *before* appeal. Therefore, it does not bar "nonfrivolous appeals by those who are unable to post the bond," 405 U.S. at 78, since there is no prior monetary bar or restriction on the ability to appeal.

Third, in *Lindsey*, this Court found that the double bond requirement did not effectuate the stated pur-

poses of the statute because the amount of the bond was unrelated to any damages or costs the appellee might suffer. 405 U.S. at 78. This is not the case with Section 11-3-23. In *Lindsey*, an FED appellant had to post a bond equal to two hundred percent of the judgment below, which would be forfeited to the landlord if the judgment were affirmed. On its face, such an amount could bear no rational relationship to the damages suffered or the costs incurred by a landlord as a consequence of the appeal. The Mississippi penalty, however, does bear a rational relationship between the damages suffered and the costs incurred. As noted above, during the time of this appeal, Bankers Life could have *earned* up to sixteen percent interest merely by investing the amount of the award at prevailing interest rates.

Moreover, in *Lindsey*, this Court stated that "[w]e do not question here reasonable procedural provisions . . . to discourage patently insubstantial appeals if those rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." 405 U.S. at 78.

The foregoing discussion indicates that Section 11-3-23 is a narrowly drawn, generally applicable statute designed to implement two legitimate purposes of the State of Mississippi. As such, it is clearly constitutional and Bankers Life's equal protection challenge presents no substantial federal question. Therefore, the appeal should be dismissed pursuant to Rule 16.1(b) of the Rules of the Supreme Court.

B. The Punitive Damage Award Does Not Violate the Constitution

Bankers Life also alleges that the award of $1,600,000 as punitive damages violates the Excessive

Fines Clause of the Eighth Amendment and the Contract Clause of the United States Constitution. These arguments are specious and present no substantial federal question.

1. *The Excessive Fines Clause Applies Only to Criminal Proceedings*

Bankers Life misconstrues the reach of the Eighth Amendment. The Excessive Fines Clause of the Eighth Amendment applies only to criminal proceedings. *Ingraham v. Wright*, 430 U.S. 651, 664-66 (1977).

Bankers Life's argument that the Excessive Fines Clause should apply by analogy to civil punitive damage awards, Jurisdictional Statement, 16-17, flies in the face of decisions of this Court dating back to 1833, which limit the application of the Eighth Amendment to criminal proceedings. *See, e.g., Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833).[4]

Since the Excessive Fines Clause of the Eighth Amendment applies only to criminal proceedings, Bankers Life's challenge to the punitive damage award on this basis presents no substantial federal question and should be dismissed.

2. *The Punitive Damages Awarded Are Not Excessive*

Bankers Life also argues that the punitive damage award was excessive in that it bears no substantial

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[4] In its Jurisdictional Statement at 16-17, Bankers Life cites *Solem v. Helm*, 463 U.S. 277 (1983), to support its contention that the punitive damages awarded in the instant case are "without doubt excessive under the Eighth Amendment as interpreted and applied" in *Solem*. This argument blatantly ignores both the limitations of the Eighth Amendment and the decisions of this Court. *Solem* was a criminal, and not a civil case. 463 U.S. at 279-81. Therefore, it cannot support the proposition that a civil punitive damage award is excessive.

relationship to the damages suffered by Mr. Crenshaw. Jurisdictional Statement, 16. In support of this assertion, Bankers Life claims that the punishment far exceeded any possible criminal liability of Bankers Life, as measured by *Miss. Code Ann.* § 83-17-1 (1972). This argument is specious and disingenuous.

First, this Court has long recognized that punitive damages are assessed in civil cases according to the severity of the defendant's misconduct, rather than the injury suffered by the plaintiff. As this Court stated in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851):

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.

See also Massachusetts Bonding & Insurance Co. v. United States, 353 U.S. 128, 133 (1956) ("By definition, punitive damages are based upon the degree of the defendant's culpability").[5]

Second, Bankers Life's argument that the punitive damage award is excessive in that it is "3200 times greater than the relevant statutory fine for the closest analog criminal offense" is irrelevant. Jurisdictional

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[5] Even under the Eighth Amendment, this Court has long recognized that the focus of review is the relationship between the defendant's misconduct and the severity of the penalty imposed, *not* the relationship between the penalty and the damage suffered by the victim. *Solem v. Helm*, 463 U.S. at 284.

Statement, 16. The statute cited by Bankers Life, *Miss. Code Ann.* § 83-17-1 (1972), has nothing to do with this case. As Bankers Life admits, Section 83-17-1 governs fraud "in the procurement of payment or obligation for payment of insurance premiums." Jurisdictional Statement, 16. This statement has no application to the case at bar, in which Bankers Life was found to have committed the tort of bad faith refusal to pay an insurance claim. Jurisdictional Statement, 7.

In addition, Section 83-17-1 provides that any person who violates the terms of the statute "shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, *or be imprisoned for not more than one year.*" *Miss. Code Ann.* § 83-17-1 (emhasis supplied). Thus, even if this statute were applicable to the case at bar, and even if the Eighth Amendment were applicable to civil actions, the punitive damage in this case would not be excessive.

Under the statute cited by Bankers Life, if Bankers Life were a natural person and convicted under the statute, it could have been imprisoned for one year, thereby suffering the loss of one's year's income. Bankers Life's net gain from operations after dividends paid to policy holders and the payment of federal income taxes for the year 1980 was $29,350,186. *See* Statement of Bankers Life and Casualty for the year ended December 31, 1981, submitted to the Circuit Court of Jackson County, Mississippi as Plaintiff's Exhibit 9. Bankers Life's maximum loss of income, therefore, would have been $29,350,186, almost thirty times *greater* than the punitive damages awarded in this case. In this manner, even if the punitive dam-

ages in this case are compared to the liability under the criminal statute cited by Bankers Life, the punitive damage award levied against it is more than reasonable.

3. *The Award of Punitive Damages Does Not Violate The Due Process Clause*

Bankers Life further claims that the amount of the punitive damage award was excessive, and as such violated the Due Process Clause of the Fourteenth Amendment of the Constitution. Jurisdictional Statement, 17-21. This argument, however, has no basis in law.

The award of punitive damages has long been recognized as proper by this Court. In *Milwaukee & St. Paul Railway Co. v. Arms,* 91 U.S. 489, 493 (1876), this Court stated that since the doctrine of punitive damages "is too well settled now to be shaken, . . . exemplary damages may in certain cases be recovered."

This doctrine was reiterated as recently as 1984. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), a diversity case involving Oklahoma law, this Court upheld an award of $10,000,000 in punitive damages. In rejecting a claim that the federal Atomic Energy Act preempted an award of punitive damages, the Court stated that "[p]unitive damages have long been a part of traditional state tort law." 464 U.S. at 255.

In addition, even assuming *arguendo* that the Due Process Clause permits an inquiry regarding the amount of punitive damages awarded,[6] the damages

[6] The Appellee also submits that accepting this case for review raises the spectre of the Supreme Court having to review any imposition of punitive damages by any state court, since all such awards would then be open to due process attack.

awarded in this case were not so excessive as to violate due process.

As noted above, the measure of punitive damages is not the damage suffered by the plaintiff, but rather the severity of the defendant's misconduct. *Day v. Woodworth,* 54 U.S. at 371; *Massachusetts Bonding and Insurance Co. v. United States,* 353 U.S. at 133. In the instant case, the Supreme Court of Mississippi clearly stated that the bad faith refusal to pay an insurance claim is reprehensible conduct which gives rise to exemplary damages. In *Standard Life Insurance Co. of Indiana v. Veal,* 354 So. 2d 239 (Miss. 1978), the Supreme Court of Mississippi stated that:

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Id. at 248.

At trial, the trier of fact determined that there had been such a bad faith refusal, and returned its verdict and award. The Supreme Court of Mississippi found no error in the jury's verdict. Jurisdictional Statement, App. A., 49a-52a. Bankers Life's culpability and liability, therefore, were determined within the bounds of the due process of law. As such, the award did not violate the Due Process Clause of the Fourteenth

Amendment. Bankers Life's appeal on this basis should be dismissed.

4. *The Award of Punitive Damages Does Not Violate The Contract Clause*

In its Jurisdictional Statement, Bankers Life claims that the award of punitive damages violates the Contract Clause, Article I, Section 10, clause 1, of the United States Constitution, inasmuch as the damages were based on "changes in the law" effected bythe Mississippi Supreme Court. Jurisdictional Statement, 18-19 n.7. Bankers Life argues that the changes "would raise a substantial issue under the Contract Clause if the Mississippi legislature had attempted to impose new rules retrospectively on insurance contracts to the detriment of insurers." *Id.* This argument is irrelevant and has no application to the case at bar. The Contract Clause applies *only* to acts of the state legislature.

In *Tidal Oil Co. v. Flanagan,* 263 U.S. 444 (1924), this Court rejected a claim that the decision of the Supreme Court of Oklahoma violated the Contract Clause by changing a facet of the state property law upon which the action at bar depended. The Court stated that:

> [i]t has been settled by a long line of decisions, that the provision of § 10, article 1, of the Federal Constitution, protecting the obligation of contracts against state action, *is directed only against impairment by legislation, and not by judgments of courts.*

Id. at 451 (citations omitted) (emphasis supplied).

The Contract Clause of the Constitution has never been applied, before or after the decision in *Tidal*

Oil, to actions of the state courts.[7] Thus, Bankers Life's argument presents no substantial federal question and provides no basis for jurisdiction since the constitutional provision upon which it is based, the Contract Clause, is inapplicable to the actions of the Mississippi Supreme Court. This appeal, therefore, should be dismissed.

CONCLUSION

In *Aetna Life Insurance Co. v. Lavoie*, 54 U.S.L.W. 4381, 4386 (U.S. April 22, 1986) this Court stated that questions similar to those presented for consideration in this case "raise important issues which, in an appropriate setting, must be resolved." This case, however, is not an appropriate setting for the resolution of these questions inasmuch as Bankers Life neither properly nor timely presented the questions for consideration in the state courts below.

In addition, none of the questions presented in Bankers Life's Jurisdictional Statement presents a substantial federal question worthy of review by this Court. As such, the Appellee respectfully moves that this appeal be dismissed in accordance with Rule 16.1(b) of the Rules of the Supreme Court of the United States.

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[7] *See, e.g., Barrows v. Jackson*, 346 U.S. 249, 260 (1953); *Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 118 (1923); *Central Land Co. v. Laidley*, 159 U.S. 103, 109 (1895); *New Orleans Waterworks Co. v. Louisiana Sugar Refinery Co.*, 125 U.S. 18, 30 (1888); *Frazier v. Lowndes County Board of Education*, 710 F.2d 1097, 1099 (5th Cir. 1983); *Marinello v. Shell Oil Co.*, 511 F.2d 853, 859 (3d Cir. 1975); *Ruth v. Bituminous Casualty Corp.*, 427 F.2d 290, 193 (6th Cir. 1970).

May 28, 1986

Respectfully submitted,

J. P. JANETATOS
BAKER & MCKENZIE
815 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 298-8290

Counsel of Record for the Appellee

Of Counsel:

ERNEST R. SCHROEDER
VINCENT J. CASTIGLIOLA, JR.
JOHN A. BANAHAN
BRYAN, NELSON, ALLEN,
SCHROEDER & BACKSTROM
1101 Jackson Avenue
Post Office Drawer 1529
Pascagoula, Mississippi 39567
(601) 762-6631

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW

ASSIGNMENTS OF ERROR

A.

The trial court erred in submitting the issue of punitive damages to the jury as there is no proof of any action by Bankers Life which could support an award of punitive damages under the applicable law.

B.

The punitive damages award was not only erroneous, it was grossly excessive and the trial court erred in failing to grant a new trial or a remittitur on this basis.

C.

The trial court erred in allowing Appellee to question Appellant's medical expert regarding civil malpractice actions.

D.

The trial court erred in denying Appellant's motion for mistrial after learning a juror had failed to properly respond to voir dire questions.

E.

The trial court erred in permitting improper argument of counsel and in overruling Appellant's motion for mistrial.

F.

The award of punitive damages violates Appellant's due process rights.

Respectfully submitted,

GEORGE F. WOODLIFF
CHARLES G. COPELAND
Suite 1030 Capital Towers
Jackson, Mississippi 39201

JOHN M. KINARD
MICHAEL J. MCELHANEY
Post Office Box 787
Pascagoula, Mississippi 39567

Attorneys for Appellant
Bankers Life and Casualty Company

Of Counsel:

HEIDELBERG, WOODLIFF AND FRANKS
Suite 1030 Capital Towers
Jackson, Mississippi 39201

MEGEHEE, BROWN, WILLIAMS
AND MESTAYER
Post Office Box 787
Pascagoula, Mississippi 39567

APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,123

BANKERS LIFE AND CASUALTY CO.
v.
LLOYD M. CRENSHAW

BRIEF OF THE APPELLANT

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E. The Court Erred In Permitting Improper Argument Of Counsel And In Overruling Appellant's Motion For Mistrial .....

F. The Award Of Punitive Damages Violates Appellant's Due Process Rights .....

G. Conclusion .....

* * * * *

F.

THE AWARD OF PUNITIVE DAMAGES VIOLATES APPELLANT'S DUE PROCESS RIGHTS

The right of access to the courts is a fundamental right implicit in the concept of ordered liberty and guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution; *Ex Parte Hull*, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034 (1941); *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed.2d 718 (1969); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed.2d 405 (1963); and Sections 24 and 25 of Article 3 of the Mississippi Constitution of 1890. The threat of unrestricted punitive damages awards, such as

$1,600,000, existing whenever an insurer litigates a contested claim, has a substantial "chilling effect" on the exercise of this fundamental right. This threat of unlimited punishment constitutes an oppressive influence on an insurer's decision whether to contest any claim. The dissent in *Standard Life v. Veal*, expressed its displeasure with this fundamental unfairness as follows:

> The Constitutional right of a litigant to defend a suit brought against him will be severely chilled, to say the least, if he is required to expose himself to the prospect that in the event he and his counsel should prove to be mistaken in their position and he loses, he will be assessed with punitive damages. This has never been the law in Mississippi, and should never be.

354 So. 2d at 252, 253.

Allowing a punitive damage award against Bankers Life because it chose to litigate the issue of coverage violates its due process rights and the rights of others similarly situated.

G.

CONCLUSION

Bankers Life submits to this Court and urges this Court to find that this was not a proper case for imposing a punitive damage award. This court has accomplished its purpose in *Veal* and *Wetherbee*, of warning insurers to deal fairly and justly with their insureds. This Court should continue to follow the course it has chartered in prior "bad faith" cases and allow punitive damages only where the insurer has been guilty of "intentional wrong, insult, abuse or gross negligence." To affirm this case, where there existed a genuine disputed issue of medical fact, would serve Mr. Crenshaw quite well. It would not serve the best interest of the citizens of the State of Mississippi nor

would it serve the ends of justice and fairness which this Court has always sought.

> 'We are slow to impose upon an insurer liabilities beyond those called for in the insurance contract. To create exposure to such risks except for the most extreme circumstances would, we are certain, be detrimental to the consuming public whose insurance premiums would surely be increased to cover them.'

Findley v. Time Ins. Co., 573 S.W.2d 908, 910 (Ark. 1979) quoting *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976).

Respectfully submitted,

GEORGE F. WOODLIFF
CHARLES G. COPELAND
Suite 1030 Capital Towers
Jackson, Mississippi 39201

JOHN M. KINARD
MICHAEL J. MCELHANEY
Post Office Box 787
Pascagoula, Mississippi 39567

Attorneys for Appellant
Bankers Life and Casualty Company

Of Counsel:

HEIDELBERG, WOODLIFF AND FRANKS
Suite 1030 Capital Towers
Jackson, Mississippi 39201

MEGEHEE, BROWN, WILLIAMS
AND MESTAYER
Post Office Box 787
Pascagoula, Mississippi 39567

APPENDIX C

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

CAUSE NO. 11,292

LLOYD M. CRENASHAW

v.

BANKERS LIFE AND CASUALTY CO.

ANSWER

COMES NOW the Defendant, Bankers Life and Casualty Company, by and through its duly authorized attorneys, and files this its Answer to the allegations of the Declaration in the above styled Cause, and in support thereof would respectfully show unto the Court as follows, to-wit:

1. The Defendant admits the allegations of Paragraph I of the Declaration.

2. The Defendant admits its corporate status alleged in Paragraph II of the Declaration. The Defendant does not know how the further allegations of Paragraph II relate to the claim in question, and therefore denies same.

3. The Defendant admits the allegations contained in Paragraph III of the Declaration.

4. The Defendant is without information upon which to base an admission or denial as to the alleged circumstances

concerning the cause of the Plaintiff's injury and his subsequent medical treatment, and therefore must hereby deny same. The Defendant admits that the Plaintiff made a claim under the insurance policy in question, and that said claim has been refused. The Defendant admits that the Plaintiff has given proper notice, but denies that he is entitled to the benefits as claimed, all as alleged in Paragraph IV of the Declaration.

5. The Defendant admits the fact of the Plaintiff's demands and that the claim has been denied, but denies that said denial was based upon erroneous information, and further denies the Plaintiff's interpretation of Exhibit A stating that same speaks for itself, all as alleged in Paragraph V of the Declaration.

6. The Defendant denies the allegations of Paragraph VI of the Declaration, except to admit that Exhibit B speaks for itself.

7. The Defendant admits the allegations concerning the provisions of the insurance contract as alleged in Paragraph VII of the Declaration, but denies that the refusal thereof was based upon a legitimate claim which forced the Plaintiff to litigate, all as alleged in Paragraph VII of the Declaration.

8. The Defendant denies the allegations of Paragraph VIII of the Declaration and each sub-paragraph thereof.

9. The Defendant denies the allegations of Paragraph IX of the Declaration.

10. The Defendant denies the allegations of Paragraph X of the Declaration.

WHEREFORE, PREMISES CONSIDERED, your Defendant denies that it is indebted unto the Plaintiff in the sum of $20,000.00 as provided for in the insurance contract, or for the sum of $400,000.00 punitive damages, or any sum whatsoever, and hereby requests to be dismissed from this cause, with costs to the Plaintiff.

Respectfully submitted,

BANKERS LIFE AND CASUALTY COMPANY

BY: MEGEHEE, BROWN, WILLIAMS & MESTAYER

BY: /s/John M. Kinard
JOHN M. KINARD

JOHN M. KINARD
MEGEHEE, BROWN, WILLIAMS AND MESTAYER
Post Office Box 787
Pascagoula, Mississippi 39567
Phone: (601) 762-2271

APPENDIX D

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

CAUSE NO. 11,292

LLOYD M. CRENSHAW
v.

BANKERS LIFE AND CASUALTY CO.

MOTION FOR NEW TRIAL OR REMITTITUR IN THE ALTERNATIVE

COMES NOW the Defendant, BANKERS LIFE AND CASUALTY COMPANY, by and through its duly authorized attorneys, and files this its Motion for New Trial or Remittitur in the Alternative, and in support thereof, would respectfully show unto the Court as follows, to-wit:

I.

That a jury award was rendered against your Defendant on December 3, 1981, in the sum of $20,000.00 in actual damages and $1,600,000.00 in punitive damages in this cause. That your Defendant being aggrieved thereby, and by certain rulings of the Court therein, files this Motion in order for the trial court to review its findings and the jury's award pursuant to Section 11-1-55 of the Mississippi Code of 1972, Annotated.

II.

The verdict of the jury was so excessive as to evidence bias, passion and prejudice against the Defendant, BANKERS LIFE AND CASUALTY COMPANY; therefore, your Defendant is entitled to a new trial thereby.

III.

That the Court erred in allowing the issue of punitive damages to go before the jury because there was an arguable and reasonable basis for the denial of the payment of Plaintiff's claim for insurance benefits and therefore, by so allowing this issue before the jury, the lower court has committed error for which new trial should be granted.

IV.

That the Court committed error in refusing certain of the Defendant's jury instructions and granting certain of the Plaintiff's jury instructions which prejudiced the Defendant and formed the basis of error in this case.

V.

That the trial court failed to grant the Defendant's motion for mistrial dealing with the issue of an improperly impounded juror and improper statements by Plaintiff's counsel during closing argument.

VI.

That the jury was allowed to consider testimony of two witnesses by deposition whose testimony was not properly offered into evidence; therefore, same should have not been considered by the Court and Jury and their having done so constituted error.

VII.

That the Court erred in allowing the introduction of witness' testimony by deposition over objection when the

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original of said deposition had not, at the time same was read into open court, been filed with the Clerk of the Court as required by law. That further, there is no showing in the record that said deposition was ever made a part of the file with the Court Clerk or the Court itself during the pendency of the trial nor was the same ever offered into evidence after having been so read into the record.

WHEREFORE, PREMISES CONSIDERED, your Defendant prays that the Court will duly consider and grant this its Motion for new trial or in the alternative grant it a substantial remittitur from the jury's award in this action, for these and other causes to be shown on the hearing hereof.

Respectfully submitted,

BANKERS LIFE AND CASUALTY COMPANY

BY: MEGEHEE, BROWN, WILLIAMS & MESTAYER, P.A.

BY: /s/ JOHN M. KINARD
JOHN M. KINARD

JOHN M. KINARD
MEGEHEE, BROWN, WILLIAMS AND MESTAYER, P.A.
3112 Canty Street
Post Office Box 787
Pascagoula, Mississippi 39567
Phone: (601) 762-2271

Supreme Court, U.S.
FILED
JUN 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From The Supreme Court of Mississippi

REPLY MEMORANDUM

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL
COPELAND, COOK, TAYLOR & BUSH
Post Office Box 2132
Jackson Mississippi 39225-2132

TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

*THEODORE B. OLSON
LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY MEMORANDUM

Appellee's Motion to Dismiss ("Motion"), offers a series of speculations regarding potential bases for the absence of any reference to appellant's federal constitutional challenges in the opinion of the court below or its order denying appellant's Petition for Rehearing and Motion to Correct Judgment. However, the court below did not rely on any of the arguments advanced for the first time here by appellant. Even had the court done so expressly, appellee could not escape the square holding of this Court in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), that the Supreme Court of Mississippi "regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions." *Id.*, at 263 (footnote omitted).

Appellee does not even attempt to bring to this Court's attention any evidence that the practice, determined by this Court to be regularly followed as of 1982, is no longer the practice of the court below. Appellee could not do so because the court below has, subsequently to this Court's decision in *Hathorn*, corroborated this Court's determination in *Hathorn* by continuing to entertain and decide questions raised for the first time at the rehearing stage. *See Pitts* v. *Mississippi Bar Association*, 462 So.2d 340, 342 (Miss. 1985) (en banc).

Even appellee's attempt to restrict *Hathorn* to cases in which the court below "renders an unexpected interpretation of state law" is of no avail because appellee does not contest appellant's argument that the punitive damage award in this case could have been affirmed by the court below only by the application of new substantive rules regarding the imposition of such awards. Thus, under his own analysis of *Hathorn*, appellee necessarily concedes this Court's jurisdiction.

I

JURISDICTION

In *Hathorn* v. *Lovorn*, this Court considered—after full briefing of the point—and rejected the argument that a question raised for the first time by a party in a petition for rehearing in the Supreme Court of Mississippi could be viewed as having been improperly presented for purposes of this Court's jurisdiction. This square holding in *Hathorn* was based upon this Court's determination, not challenged by appellee here, that the court below regularly entertains new questions in petitions for rehearing. This determination compelled the Court's holding in *Hathorn* that the federal question presented for the first time on rehearing in the Supreme Court of Mississippi in that case was properly presented for purposes of this Court's jurisdiction, because under the well-established rule laid down in cases such as *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964), no state procedural rule may be successfully invoked to deprive this Court of jurisdiction over a substantial federal question unless that rule is "strictly or regularly" followed by the state court. The practice of the court below is regularly to *permit* the raising of federal and state law issues at the rehearing stage. Since this Court's decision in *Hathorn*, the Supreme Court of Mississippi has continued this practice.

Appellee purports to distinguish *Hathorn* on two bases. First, appellee argues, Motion, at 9, that *Hathorn* controls only cases "in which the Mississippi Supreme Court renders an unexpected interpretation of state law." Appellee's argument, however, is based on this Court's discussion of a single case in the court below, *Quinn* v. *Branning*, 404 So.2d 1018 (Miss. 1981), when in fact this Court relied on at least a dozen other decisions of the court below in addition to *Quinn* in determining what the actual practice of the court below *is*. Appellee does not suggest that the other cases relied on by this Court in *Hathorn* involved

situations in which the court below had rendered "an unexpected interpretation of state law." Any such argument would fail. *See, e.g., Powers* v. *Malley*, 302 So.2d 262, 264-65 (Miss. 1974) (court applies existing law to question of plaintiff's legal entitlement to an instruction).

Even if *Hathorn* could be limited as suggested by appellee, it would still squarely control this case. As argued by appellant, Juris. Stat., at 18-19 & n.7, the punitive damage award in this case could have been affirmed *only* by a substantial modification to the substantive rules governing bad faith actions in Mississippi and the establishment of new rules to govern such actions. Nowhere in his Motion in this Court does appellee contest this point. Thus, under appellee's own reading of *Hathorn*, the appellant cannot be expected to have anticipated these changes in governing Mississippi law and this Court has jurisdiction over this case. Even in the absence of *Hathorn*, the doctrine of surprise established in cases such as *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930), and *Saunders* v. *Shaw*, 244 U.S. 317 (1917), would lead to the same result.

Second, appellee argues, Motion, at 9 n.2, that the cases relied on by this Court in *Hathorn* involved "factual" rather than "legal" questions which were raised on rehearing. However, *Powers* v. *Malley*, *supra*, and other cases relied on in *Hathorn* such as *McCrory* v. *State*, 342 So.2d 897 (Miss. 1977) (grand jury held legally entitled to compel person to provide handwriting samples under Mississippi constitution), are contrary to appellee's assertion.[1]

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[1] Appellee's point is as obscure as its characterization of these cases is inexplicable. Certainly any state court rule permitting new factual issues to be raised for the first time at the rehearing stage but forbidding the raising of substantial federal constitutional questions on the same basis would be viewed as an invidious discrimination against litigants who either desire or must assert their federal rights in the state courts of Mississippi.

While appellee's inability to distinguish *Hathorn* v. *Lovorn* is dispositive of the claim that this Court has no jurisdiction over this case, appellant would nonetheless prevail on the question of jurisdiction even if there were no established practice in the court below of regularly entertaining and deciding issues raised for the first time at the rehearing stage in that court.

A. Presentation of the Federal Constitutional Challenge to *Miss. Code Ann.* § 11-3-23 (Supp. 1982).

Appellee acknowledges, as he must, that for over a century the court below has regularly entertained questions regarding the interpretation and constitutionality of § 11-3-23 and its predecessor statutes in post-affirmance motions. Appellee's response is to attempt to draw a distinction between cases in which the penalty is imposed, in which a post-affirmance challenge is permitted, and cases in which the penalty is not, in which a post-affirmance objection is permissible. This argument finds no support in logic or cases in the court below[2] and cannot be rec-

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[2] Appellee points out, Motion, at 7, that the court below has not issued any interpretation of § 11-3-23 at the rehearing stage other than in connection with a motion filed by an appellee who was seeking to recover an appeal penalty from an appellant. Appellee apparently draws the inference from this fact that the court below allows appellees to raise questions regarding § 11-3-23 at the rehearing stage, but does not allow appellants to do so. If that is a rule of the court below, it has never been articulated by that court in any decision, and no such rule is to be found in any statute of Mississippi or rule of the Supreme Court of Mississippi. *See Hathorn* v. *Lovorn*, 457 U.S., at 263 n.13. Nor does appellee point to *any* case in the court below in which that court has expressly refused to consider a question raised by an appellant regarding § 11-3-23. Indeed, under appellee's analysis the court below follows an unarticulated rule under which an appellant can raise a federal constitutional challenge to § 11-3-23 at the rehearing stage, but can only do so *if* the court below, for whatever reason, fails to impose the penalty on the appellant *and* the appellee seeks imposition of the penalty, the situation present in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). Appellee understandably fails to suggest what rational state pur-

onciled with Rule 19 of the Rules of the Supreme Court of Mississippi. That rule admits of no such distinction, stating plainly that "[a]ll motions . . . for the *awarding or disallowance* of fifteen percent (15%) damages on appeal . . . shall be filed within thirty (30) days from the date of the handing down of the opinion." (emphasis added). Furthermore, appellant could not reasonably have anticipated that the court below would refashion the Mississippi substantive law of bad faith in order to affirm this punitive damage award. Appellant was not required, any more than was the petitioner in *Hathorn* v. *Lovorn*, to raise its challenge to the relevant state statute on direct appeal.[3]

B. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award

Appellee's discussion of appellant's presentation of its challenge to the punitive damage award neither mentions *Hathorn* v. *Lovorn* nor argues that appellant's presentation of this federal question at the rehearing stage was in any way deficient. Indeed, appellee's argument does not respond at all to the fact that at the rehearing stage, appellant expressly invoked the Due Process Clause of the Fourteenth Amendment in challenging the punitive damage award. If, as appellant maintains, *Hathorn* v. *Lovorn* is dispositive of appellant's right to raise this federal con-

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pose such a bizarre rule would serve, a failure which reflects the incredibility of appellee's conjecture.

[3] Thus, appellee's argument, Motion, at 9-10, that appellant should have known that the fifteen percent penalty would be assessed if the trial court's judgment were affirmed is correct but is beside the point. The question is not whether appellant knew that the appeal penalty would be imposed if the trial court's judgment were affirmed; rather, it is whether appellant could anticipate that a bare majority of five members of the court below would affirm the punitive damage award by changing previously applicable and controlling Mississippi law. Section 11-3-23 therefore came into play only because of that change in Mississippi law, and appellant raised its federal challenge at the first (and only) opportunity thereafter.

stitutional question, then the entirety of appellee's challenge to this court's jurisdiction over this question is irrelevant to the question of this Court's power to decide this question.

Appellee's arguments regarding appellant's challenge to the punitive damage award prior to the rehearing stage are both legally irrelevant and lack merit. Appellee relies on Rule 6 of the Rules of the Supreme Court of Mississippi to argue that appellant's assertion below that " '[t]he award of punitive damages violates Appellant's due process rights' " was not sufficiently "distinctly assigned" to permit argument of that question in the Supreme Court of Mississippi. Appellee relies on two cases in the court below, one which involved the total absence of any assignment of the point argued, *Harkins* v. *Paschall*, 348 So.2d 1019, 1024 (Miss. 1977), and one in which the court below, after invoking Rule 6, decided the very point which it said was not properly assigned, *Dorroh* v. *Cotten*, 259 So.2d 121, 123 (Miss. 1972). The third case relied on by appellee, *Overstreet* v. *Allstate Insurance Co.*, 474 So.2d 572 (Miss. 1985), also resulted in the resolution by the court below of an issue which had not been raised by the appellant until the filing of its rebuttal brief, even though the court below, as it had done in *Dorroh*, suggested that it could not reach that issue because of Rule 6. Thus, of the three cases in the court below cited by appellee to support this argument, one is distinguishable on its facts because it involved *no* presentation of the point to be argued (*Harkins*), and the other two (*Dorroh* and *Overstreet*) demonstrate that the practice of the court below is to invoke, then ignore, Rule 6. Whatever Rule 6 may mean, it could in no event serve as a bar to this Court's jurisdiction over a substantial federal question because it is not "strictly or regularly" followed.[4]

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[4] The decision in *Overstreet* also refutes the appellee's unsupported assertion, critical to his argument, that the "plain language" of Rule

Appellee next raises, Motion, at 13, an entirely separate argument that the assignment of error as quoted above could have been an invocation of Mississippi's due process clause, Miss. Const. Art. 3, § 14, rather than the Due Process Clause of the Fourteenth Amendment. Appellee invokes this Court's decision in *Webb* v. *Webb*, 451 U.S. 493 (1981), a case in which this Court, after reviewing the record and briefs of the parties filed in the Supreme Court of Georgia, concluded that the petitioner had never cited to or invoked *any* provision of the federal constitution in the Georgia courts. Because no federal constitutional right had ever been asserted "at any point in the state-court proceedings," *id.*, at 498, the *Webb* Court concluded that it was without jurisdiction over the case.

Appellee's confused reliance on *Webb* simply fails to reckon with the fact that appellant expressly invoked the Due Process Clause of the Fourteenth Amendment in its brief on direct appeal, J.S. App., at 135a, and at the rehearing stage, J.S. App., at 150a. This reliance by appellant on the Fourteenth Amendment, however inartful,[5] renders *Webb* inapposite.[6]

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6 does not permit a defect in an assignment of errors to be cured by a more specific argument in a brief, Motion, at 11. The clear implication from *Overstreet* is that had the appellant raised the point in its opening brief rather than waiting until its rebuttal brief, thereby denying the appellee a chance to respond, Rule 6 would not have been applicable at all.

[5] The main thrust of appellee's argument, as stated in his Motion, at 16 n.3, appears to be that appellant did not adequately develop its federal constitutional challenge to the punitive damage award in the courts below. However, as numerous cases in this Court make clear, this Court's "jurisdiction does not depend on citation to book and verse," *Eddings* v. *Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). The specificity with which appellant raised its federal constitutional challenge to the punitive damage award is at least as substantial as in cases over which this Court has assumed jurisdiction, including, in addition to *Eddings*, *Taylor* v. *Kentucky*, 436 U.S. 478, 482 n.10 (1978) (Fourteenth Amendment not invoked until judgment was on appeal); *Webb's Fabulous Phar-*

Finally, appellee argues that appellant failed to raise its federal constitutional challenge to the punitive damage award in its motion for new trial. Motion, at 15. As discussed above with respect to the raising of this federal constitutional question on direct appeal, appellee's argument appears to be nothing more than a quibble over the "imprecise language" used in appellant's post-trial motion. Appellant's express reliance on the Due Process Clause of the Fourteenth Amendment on direct appeal clearly cured any arguable defect in its post-trial motion, *see* note 5 and cases cited, *supra*, insofar as this Court's rules regarding proper presentation are concerned. And, like many of the cases relied on by appellee in this Court to support other points, the cases cited by appellee actually reinforce and extend the determination of this Court in *Hathorn* v. *Lovorn* that the court below, if it even has any rules regarding presentation of questions to it on direct appeal, does not apply any rule consistently enough to displace this Court's jurisdiction.[7]

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macies, Inc. v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (Court has jurisdiction based on "due process" arguments advanced in a memorandum which made reference several pages later to the state constitution "and its Federal counterpart"); and *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 (1954) (invocation of federal Commerce Clause sufficient to raise question properly cognizable under the Due Process Clause of the Fourteenth Amendment).

[6] As is clear from *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S., at 159 n.5, if appellant had relied below on both Mississippi's due process clause and the Due Process Clause of the Fourteenth Amendment, that reliance would not have affected this Court's jurisdiction, which arises solely from appellant's invocation of the Due Process Clause of the Fourteenth Amendment. Thus, appellee's suggestion, Motion, at 11-13, that appellant's assignment of error could have been a reference to Mississippi's due process clause is irrelevant to this Court's jurisdiction over this case.

[7] In addition to the cases cited and discussed at p. 6, *supra*, appellee cites, Motion, at 14, three cases assertedly supporting the proposition that the court below "has consistently refused to consider on appeal defenses which were not alleged or argued at trial." None of those

Appellee understandably makes no reference to the fact that the trial court held that it had no power to reduce the punitive damage award, Juris. Stat., at 11. Nor does appellee in any way challenge appellant's assertion, Juris. Stat., at 11, that this express ruling of the trial court deprived appellant of "a reasonable opportunity to have the issue as to the claimed [federal] right heard and determined by that court." *Central Union Telephone Co.* v. *Edwardsville*, 269 U.S. 190, 194-195 (1925).[8]

---

cases suggests that a federal constitutional challenge to the size of a punitive damage award would be regarded as a "defense" as appellee uses that term. In addition, in one of those three cases, the court below expressly reached the merits of the issue it indicated could not be raised. *Memphis Bank & Trust Co.* v. *Pate*, 362 So.2d 1245, 1250, (Miss. 1978) ("appellant had perfected its security interest . . . ."). In the other two cases, the court below remanded the cases for new trial and invited the pertinent parties to raise the issues anew. *Cain* v. *Mid-South Pump Co.*, 458 So.2d 1048, 1051 (Miss. 1984); *Dobbs-Maynard Co.* v. *Jumper*, 388 So.2d 879, 883 (Miss. 1980). Indeed, in *Dobbs-Maynard* the court below directed the parties to one of its cases "bearing" on the issue.

Appellee, Motion, at 15, cites three cases purporting to stand for the proposition that an assignment of error not included in a motion for new trial "is deemed waived and will not be considered on appeal." In one of the cases cited by appellee, the court below stated that principle and then proceeded to rule on the question it said could not be raised. *Mercier* v. *Davis*, 234 So.2d 902, 904 (Miss. 1970). This pattern of the court below in reaching and deciding questions said to be beyond its power to decide because not raised at the trial level is repeated in yet another case relied on by appellee, Motion, at 15, for the proposition that these technical pleading rules are applicable to constitutional issues. In *Comfort* v. *Landrum*, 52 So.2d 658, 659 (Miss. 1951), the court below, after squarely holding that there "is no merit in appellant's contention that he was denied due process of law," went on to observe that "these constitutional issues were not raised in the trial court, so appellant is in no position to raise them for the first time on appeal."

[8] Appellee also argues, Motion, at 14, that appellant's federal constitutional challenge had to be pleaded as an affirmative defense in appellant's Answer to the complaint. None of the cases apparently cited

Under these circumstances, appellee's arguments, taken individually or collectively, do not undermine this Court's jurisdiction. There is simply no doubt that "the record as a whole shows [both] expressly [and] by clear intendment" that the federal questions presented in this appeal have been "adequately presented." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

II

THE SUBSTANTIALITY OF THE FEDERAL QUESTIONS

Six Justices of this Court declared six weeks ago that the identical issues raised by appellant in this case are "important issues which, in an appropriate setting, must be resolved." Appellee fails to respond to this unequivocal statement in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601, other than to state that "none of the questions presented [by Bankers Life] presents a substantial federal question . . . ." Appellant submits that this Court determined in *Lavoie* that the questions now being raised by Bankers Life are substantial, and appellee has not even endeavored to suggest otherwise.

---

by appellee for that proposition, or the state statute relied upon by appellee, even discuss whether Mississippi requires federal constitutional issues to be raised in a litigant's initial pleading in order to be preserved for appellate review. In any event, appellant's federal constitutional challenge regarding the excessiveness of the punitive damage award was not susceptible to being framed until the jury returned a verdict in the size it did.

June 2, 1986

Respectfully submitted,

*THEODORE B. OLSON
LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Appellant
**Counsel of Record*

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL

COPELAND, COOK, TAYLOR
& BUSH
Post Office Box 2132
Jackson, Mississippi 39225-2132

TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE & CASUALTY CO.,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From The Supreme Court of Mississippi

JOINT APPENDIX

*BRUCE J. ENNIS, JR.
KIT ADELMAN-PIERSON
PAUL R. FRIEDMAN
ENNIS FRIEDMAN & BERSOFF
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100
Attorneys for Appellee

*THEODORE B. OLSON
LARRY L. SIMMS
TERENCE P. ROSS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Appellant
**Counsel of Record*

JURISDICTIONAL STATEMENT FILED 4/25/86
JURISDICTION NOTED 3/9/87

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Jury Instruction No. D-1	JA-20
Jury Instruction No. D-7	JA-21
Jury Instruction No. D-8	JA-22

DOCKET ENTRIES IN THE SUPREME COURT OF MISSISSIPPI

BANKERS LIFE & CASUALTY CO.

vs.

LLOYD M. CRENSHAW
Circuit Court
Jackson County

Clinton E. Lockhart
Chancellor
Sureties A. Bond

		8 Vols. Record & $50.00 Filing Fee & Supr. Bond-8/4/82
Trans. Joe W. Martin, Jr.	(5)(4)	Assignment of Error--George F. Woodliff, Charles G. Copeland/Heidelberg, Woodliff & Franks 9/13/82
	(4)	Brief of Appellant--and John M. Kinard, Michael J. McElhaney 9/13/82 fh
	(1)	Abstract of Record--and McGehee, Brown, William & Mestayer 9/13/82 fh
Binding Paid $32.00	(4)	Supplemental Abstract--Ernest R. Schroeder, Vincent J. Castigliola, Jr. & 10/1/82 kg
	(4)	Brief for Appellee-John A. Banahan all of Bryan, Nelson, Allen, Schroeder & 10/1/82 kg
Term Oct., 1981	(4)	Motion to Strike Appellant's Brief--Backstrom, " " 10/1/82 kg
	(4)	Brief in Support---

Date of Judgment(4) 12/3/81	Response to Appellee's Motion to Strike Appellant's Brief--George F. Woodliff & Charles G. Copeland of H, W&F; John M. Kinard & Michael J. McElhaney,Jr. of M,B, W&M 10/6/82 kg
Judgment (4)	Appellant's Brief in Opposition to Appellee's Motion to Strike Appellant's Brief--George F. Woodliff & Charles G. Copeland of H, W&F; John M. Kinard & Michael J. Mcelhaney,Jr. of M,B, W&M 10/6/82 kg
Opinion No. 993(4) ABC/50+8+39=97	Brief in Support--H, W&F; JOhn M. Kinard & Michael J. McElhaney, Jr.of M,B, W&M 10/6/82 kg
Attoneys Appellant	MOTION TO STRIKE APPELLANT'S BRIEF, BRIEF IN SUPPORT, RESPONSE, APPELLANT'S BRIEF IN IN OPPOSITION (COPY OF APPELLANT'S BRIEF), MOTION TO STRIKE SUPP. ABSTRACT, BRIEF IN SUPPORT AND COPY OF Supp. Abs. SUBMITED--10/7/82 sb
John M. Kinard Megehee, Brown,(4) Williams & Mestayer Box 787, Pascagoula, Ms 39567	Vol. 1 10/11/82
	Appellant's Rebuttal Brief--George F. Woodliff & Charles G. Copeland of H, W&F; John M. Kinard & Michael J. McElhaney of M,B, W&M 10/13/82 kg

	ORAL ARGUMENT Requested--Charles G. Copeland of H, W&F 10/13/82 kg
George F. Woodliff (4)	Response to Motion to Strike Supp. Abstract--Vincent J. Castigliola, Jr.; B,N,A, S&B 10/15/82 kg
Charles G. Copeland (4)	Brief in Support--Ernest R. Schroeder, John A. Banahan, " 10/15/82 kg
	The above was postmarked 10/8/82 & was stamped "Delayed Due to Incorrect Zip Code" (39200) kg
	Response of Brief in Support Submitted 10-15-82
	ORAL ARGUMENT REQUESTED--Ernest R. Schroeder of BNAS&B---10/18/82 gp
Charles G. Copeland Copeland, Cod, Fryer & Bush Box 2132 Jackson, 39205 Attorney's Appellee	MOTION TO STRIKE APPELLANT'S BRIEF OVERRULED 10/20/82 BW PAGE 35
	*Appellant's Abstract sent to Mr. McLendon--10/25/82 vb

Earnest R. Schroe-(4) der Drawer 1529 Pascougla, MS 39567	*MOTION TO STRIKE APPELLEE'S SUPPLEMENTAL ABSTRACT OVERRULED, 11/3/82 BW PAGE 81
	Copy of Letter to Greg Copeland and Slip Opinion from Vincent J. Castigliola, Jr. 2/23/83 fh
	(Letter & Opinion attached to Brief of Appellee) BRYAN, NELSON, ALLEN, SCHROEDER and BACKSTROM fh
(4)	Additional authorities to be attached to Brief--Charles G. Copeland of HW&F--12/16/83--gp
(5)	Additional Authorities (HOrton v. Hartford LIfe)--Charles G. Copeland of HW&F--1/12/84 ms
Bryan, Nelson, Allen, Schroeder and Backstrom P.O. Drawer 1529 1103 Jackson Avenue Pascagoula, MS 39567-0116	Argued & SUbmitted 2-23-84 BW 633
	OPINIONS (3) RENDERED September 11, 1985
	*AFFIRMED September 11, 1985 BY PAGE 29
	(9/12/85 1p sent all 4 Firms a copy of BY Page 29) 9/17/85 lp
	Motion for Time to File Petition-Charles G. Copeland (CCY&B); John M. Kinard (MBW&M)-/

Attorneys, Appellee	15	Petition for Rehearing due October 11, 1985--9/19/85--gp Mr. Copeland called stating Heidelberg's Firm are no longer in this case-9/23/85 ms
Harry L. Kelly	(10)	Petition for Rehearing-Charles G. Copeland, J. Tucker Mitchell (CCT&B); John M. Kinard, Michael J. McElhayey (MBW&M) -10/11/85 lp
202 Barnett Bldg	(10)	Brief in Support " " " "-10/11/85 lp
Jackson, Ms 39201	(10)	Motion to Correct Judgment " " " -10/11/85 lp
	(10)	Brief in Support " " "-10/11/85 lp MOTION TO CORRECT JUDGMENT, BRIEF & NOTE THAT PET IS PENDING SUB. 10/14/85 lp
	(4)	Brief in Response to Motion to Correct Judgment-John A. Banahan (B,N,A,S&B)-10/17/85 sb BRIEF IN RESPONSE TO MOTION TO CORRECT JUDGMENT SUB. 10/17/85 lp 11/19/85- Copy of letter from Court requesting a reply to Petition For Rehearing. REPLY DUE 11/30/85 and APPELLEE'S RESPONSE DUE (5) FROM RECEIPT OF REPLY.

Charles Greg Copeland	(10)	Response to Petition for Rehearing--Ernest R. Schroeder, Vincent J. Castigliola, Jr. & John A. Banahan of BNAS&B-11/27/85--yb
Attorneys, Appellees	(10)	Rebuttal Brief in Support of Petition for Rehearing (6pp)--Charles G. Copeland, J. Tucker Mitchell (CCT&B), John M. Kinard and Michael J. McElhaney (MBW&M)--12/4/85--bbm (Guard's Box)
Wayne Snuggs: Asst. Atty. Gen.		*MOTION TO CORRECT JUDGMENT OVERRULED; PETITION FOR REHEARING DENIED 2/26/86 BY PAGE 340 MANDATE ISSUED 3/3/86 lp
	(11)	Motion & Brief for Stay of Issue of Mandate & Supersedeas from Execution & 2 Proposed Orders--Charles G. Copeland & J. Tucker Mitchell of CCT&B; John M. Kinard & Michael J. McElhaney of MBW&M 3/5/86 kg Motion & Brief for Stay sub. 2-5-86
	(11)	Response to Motion for Stay--John A. Banahan of BNAS&B 3/7/86 kg

Response sub. 3-7-86

	(11)	Rebuttal Brief in Support of Motion for Stay of Mandate--Charles G. Copeland & J. Tucker Mitchell of CCT&B; John M. Kinard & Michael J. McElhaney of MBW&M 3/7/86 kg submitted sub. 3-7-86 *MOTION FOR STAY OF ISSUE OF MANDATE AND SUPERSEDEAS FROM EXECUTION OVERRULED March 12, 1986 BY PAGE 376 (continued in middle of this page)
JACKSON, MS 39201		54,123 Bankers Life and Casualty Company vs. Crenshaw (cont. from bottom of this page)
Attorneys, Appellee (1)		Notice of Appeal to the Supreme Court of the United States--Charles G. Copeland and J. Tucker Mitchell of CCT&B--4/9/86 gp

Wayne Snuggs; Asst. Atty. Gen.	Org. ltr. dtd. 3/5/86 to Judge Robertson from Charles G. Copeland (CCT&B) with copy of Motion to stay issue of Mandate and to Grant a Supersedeas from Execution rec'd. from Court 5/2/86 bhm
	Notice dtd 4/25/86 of Filing an Appeal No. 85-1765 in U.S. Court from the Office of the Clerk-5/8/86 lp
	Order from U.S. Supreme Court adv. of probable jurisdiction-Joseph F. Spaniol, Jr., Clerk-3/12/87 bhm

PLAINTIFF'S ATTORNEYS

No. 11,292 Lloyd M. Crenshaw Bryan, Nelson, Allen, Schagley, & Backstrom

COST DEPOSIT or 3-13-84 cont'd to page PS. 248

DEFENDANT'S ATTORNEYS

$40.00 Bankers Life & Casualty Co. Meghas, Bowen, Williams & Mistayer and Heidelberg Wooliff & Franks

CERTIFIED
A TRUE COPY
Jackson County
Mississippi
Joe W. Martin, Jr.
Circuit Clerk
By Ana Henning D.C.

11 10 80	Declaration of exhibits received & filed
11 13 80	Summons issued for deft. by personal service upon Hon. George Dale, Insurance Commissioner, returnable 1-12-81; marked Sheriff Hinds Co.
11 19 80	Sums. ret'd., served on Geo. Dale 11-17-80 & filed
11 19 80	Receipt rec'd from Geo. Dale & filed
12 24 80	Answer received & filed
1 8 81	Request For Production Rec'd & Filed
1 8 81	Interrogatories Propounded To The Deft. rec'd & filed
2 17 81	Answer to Interrogatories Propounded to Deft rec'd & filed
2 11 81	Answer of Deft. to Request for Production rec'd & filed
3 9 81	Deposition of Lloyd M. Crenshaw rec'd & filed
4 29 81	Supplemental Answer to request for production rec'd & filed
8 27 81	Notice to Take Deposition of William J. Herzau rec'd & filed
8 27 81	Notice to Take Deposition of Robert J. Krol rec'd & filed
8 27 81	Notice to Take Deposition of Marilyn Doyle rec'd & filed
8-27-81	Notice to Take Deposition of William J. Blessing rec'd & filed
8-27-81	Notice to Take Deposition of Donald B. Lemersol rec'd & filed
8-27-81	Notice to Take Deposition of Nathaniel P. McParland rec'd & filed
8-27-81	Notice to Take Deposition of Phil Mark rec'd & filed
8-27-81	Notice to Take Deposition of Tom Watkins, rec'd & filed
8-27-81	Notice to Take Deposition of Bankers Life & Casualty Co. rec'd & filed

9-9-81	"Sealed" Legal File of Deft. rec'd & filed
9-5-81	Evidence deposition of Dr. Nathaniel P. McParland rec'd & filed
9/26/81	Notice to Take Deposition of Dr. Christopher T. Westphal rec'd & filed
/30/81	Motion for Leave to Amend rec'd & filed
/9/81	Order Overruling Deft's. Ore Tenus Motion for Protective Order MB 42, Pgs. 346 & 347
-17-81	Supplemental Answers to Interrogatories rec'd & filed
-17-81	Answer to Amended Declaration rec'd & filed
-17-81	Motion for Continuance rec'd & filed
-17-81	Video Take Deposition of Christopher T. Westphal ms
1-17-81	Order-Continued-until December 1, 1981 MB 42 Pg. 456
11-17-81	Order that this case be cont'd from its present trial setting until December 1, 1981 MB 42, P. 456
/20/81	Jury Instruction rec'd & filed
/30/81	Jury Instructions C-1(D)-C-12(D) & D-1-D-8 rec'd & filed at 4:30 p.m.
2-1-81	Memorandum Brief rec'd & filed
2-1-81	Memorandum Brief regarding Granting of Punitive Damage Instruction
2-1-81	Partial Trial-First-Day MB 42 P. 681
2-2-81	Jury Instructions P-14-P-21 rec'd & filed at 5:00 P.M.
2-3-81	Jury Instructions P-9A; P-17A; P-19A rec'd & filed at 8:30 A.M.
2-3-81	Jury Instructions D-1; D-7; -8; D-4; D-6; and C-10(D) rec'd & filed at 9:00 A.M.
2-3-81	Depositions of Donald B. Lemersal, William J. Herzau, William A. Blessing and Robert J. Krol rec'd & filed
2-2-81	Order Partial Trial-Second Day MB 42 P. 683

2-3-81	Jury Verdict for Plaintiff-$20,000.00 actual & $2,600,000.00 punitive damages MB 42 P. 689
12-4-81	Motion for New Trial or Remittur in the Alternative
12-4-81	Order-Hearing for Motion for New Trial or Remittur set for Dec 16, 1981 MB 42 P. 705
12-8-81	Order for deft. to be allowed to substitute a true & correct copy of Plaintiff's Exhibit # 7 & the original be delivered to the Counsel for deft. MB42, P.33
12-14-81	Motion for Judgment & Notwithstanding the Verdict
12-15-81	Motion for Continue Hearing on Motion for New Trial, Remittitur, or Judgment Notwithstanding The Verdict, Pending Completion of Trial Transcript
12-16-81	Order Continuing hearing on Defts Post Trial Motions until 1-8-82 MB 43 P. 96
1-7-82	Argument and Authorities in Support of Motion of New Trial or Judgment Notwithstanding the Verdict in Alternative
1-8-82	Order ovrruling Motion for New Trial or Remittitur in The Alternative MB 43 P. 180
1-8-82	Order overruling Motion for NJOV MB 43 P. 181
1-8-82	Petition for Appeal rec'd & filed
1-22-82	Supersedeas bond approved, filed
1-29-82	Prepayment of appeal cost rec'd-Court reporter notified
4-8-82	Order allowing Court Reporter 30 additional days to file transcript MB 44, P. 364
7-2-82	Transcript rec'd & filed
8-3-82	Appeal mailed
3-4-86	Supreme Court Mandate rec'd, Judgment Affirmed

	Judgment in favor of Lloyd M. Crenshaw Against Bankers Life and Casualty Co. & the American Ins. Co., surety, in the Amount of $1,620,000.00 plus interest at 8% from 12-3-81 until pd together with Costs taxed in the Lower Court and this Court adds the sum of $243,000.00 on being damages at the rate of 15%
3-4-86	Motion For Judgment Debtor Examination rec'd & filed (Bankers Life)
3-4-86	Motion For Judgment Debtor Exemption-The American Ins. Co. rec'd & filed
3-4-86	Motion To Executive on Board (The American Insurance Co.) rec'd & filed
3-4-86	Notice of Hearing March 14th 1986-9:00 AM-Copy of Motion & Notice and Mandate Mailed Return Receipt Requested-Restructed Delivery to The American Insurance Co. P.O. Box 5139, Jackson, Ms. 39216 Mailed this date 3-4-86
3-4-86	Order Ordered that a duly authorized representative of the Deft. appear for Judgment Debtor examination, etc. MB65 P. 268-269
3-4-86	Order Ordered that a duly authorized rep.of the Surety herein appear for Judgment Debtor Examination on 3-14-86 at 9:00 A.M. MB 65 P. 270-71
3-7-86	Cert Mail Recpt rec'd delivered to Amer. Ins. Co. 3/6/86 rec & filed
3-12-86	Motion To Stay Judgment Debtor Examination & Executive on Bond rec'd & filed cont to page 248 on Back
3-14-86	Order Sustaining Motion of Plaintiff MG 65 P. 364
3-14-86	Order Deft's Motion to Stay Judgment Debtor Examination and Execution on Bond etc. is denied MB 65 P. 479
03/18/86	Suggestions for Garnishment (17) rec'd & filed

03/20/86	Writs of Garnishment (17) issued to 1) Levi Straus Co.; 2) J. Ray McDermott & Co., Inc. aka McDermott Inc.; 3) Shell Oil Company 4) General Motors Acceptance Corporation 5) CIT Financial Corp 6) Ralston Purina Company 7) Wal-Mart Stores,Inc. 8) Witco Chemical Corp aka Witco Corp 9) Republic Airlines, Inc. 10) Merrill, Lynch, Pierce, Fenner & Smith, Inc. 11) Shearson-American Express, Inc. aka Shearson Lehman-American Express, Inc. 12) Prudential-Bache Securities, Inc. 13) E.F. Hutton & Company,Inc. 14) Paine, Webber, Curtis & Jackson, Inc. aka Painewebber, Inc. 15) Dean Witter Reynolds, Inc. 16) Metropolitan Life Insurance Company & 17) The Prudential Insurance Company of America-Mailed to the Sheriff of Hinds County
3/19/86	Notice of Application to Circuit Clerk of Cook Co., IL that Lloyd M. Crenshaw wants to registered judgment rendered in this cause rec'd & filed

3-27-86	Writ of Garnishment ret'd-executed upon Metropolitan Life Ins. Co. by serving Ershire W Wells, Agent 3-25-86-Rec'd & filed Writ of Garnishment Ret'd-executed upon Prudential Ins. Co. of America by serving Ershire W. Wells, agent-3-25-86 Rec'd & filed Writ of Garnishment Ret'd-executed upon (1) Levi Straus Co., (2) J. Ray McDermott & Co. Inc. a/k/a McDermott Inscorported (3) Shell Oil Company (4) General Motors Acceptance Corportion (5) CIT Finance Corp. (6) Ralston Purina Cormpany 97) Wal-Mart Stores,Inc. (8) Witco Chemical Copr. a/k/a Witco Corporation (9) Republic Airlines Inc. (10) Merrill Lynch, Pierce, Fenner & Smith, Incorporated (11) Shearson-American Express,Inc. a/k/a Shearson Lehman-American Express Inc. (12) Prudential-Bache Securities,Inc. (13) E.F. Hutton & Company, Inc. (14) Paine, Webber, Curtis & Jakson, Incorporated a/k/a Painewebber, Incorporated (15) Dean Witter Reynolds, Inc.-Nos. (1) thru (15) was served upon C. T. Corporation, Avis Prisock, Asst. Secy. 3-24-86- Rec'd & filed
4-3-86	Motion To Compel and for Donations rec'd & filed
4-3-86	Notice of Hearing 4-11-86 9:00 AM rec'd & filed
4-7/86	Answer by Shell Oil Co.-Not Indebted rec'd & filed
4-7-86	Answer by Republic Airline, Inc.-Not Indebted rec'd & filed
4-10-86	Suggestions for Garnishment (4) rec'd & filed
4-10-86	Writs of Garnishment (4) issued to 1) Uniroyal, Inc. 2) International Harvester Company 3) Kidder Peabody & Co Inc. 4) General Electric Credit Corporation-ret'ble 7/14/86-Mailed to Hinds Co. Shf.

4-11-86	Answer of Ralston Purina Company-Not Indebted rec'd & filed
4-14-86	Answer of C.I.J. Financial Services Corp.-Not Indebted rec'd & filed
4-14-86	Answer of Prudential-Bache Securities Inc. rec'd & filed
4-11-86	Order-All Writs of Garnishment dismissed; no garnishee defendant required to file answer MB 65 Pg 737
3-26-86	Order-that partial satisfaction of judgment shall be entered & recorded in the judgment rolls of this Court & that a Certificate of Partial Satisfaction of Judgment shall be filed with the Clerk of this Court MB68 P. 18

INTER-OFFICE CORRESPONDENCE

Send to: W.Herzau Special Risk Benefits — From: Don Lemersal Claims Counsel — Date 6/19/80

Subject: City Products Policy #SR 82,900 Lloyd Crenshaw

I do not feel there is a legal question presented here at this time. Until we know more about the condition and how (and whether) the alleged accident contributed to cause the loss we cannot very well apply the Mississippi law regarding proximate cause.

If an injury caused the loss we should have some further substantiation of this. I suggest that in writing to Attorney Schroeder you explain in some detail what our file contains and point to him that we must have some substantiation that an injury caused this loss "directly and independently of all other causes."

Perhaps we should try to get more information on etiology, previous treatment, etc. The report from the VA hospital indicates there may not have been treatment before January 14, 1979.

If there is further substantiation that the loss is the result of the combination of disease and accident Mississippi law holds that where "injury aggravates, renders active, or sets in motion a latent or dormant preexisting physical condition or disease . . ." there may be recovery under this type policy. Peerless Insurance Company v. Myers, 192 S 2d 437 (1966, Miss. Sup. Ct.). However, we do not know what effect the alleged injury had on this condition, or whether the arteriosclerotic changes were dormant.

DON LEMERSAL

DBL:me

June 27, 1980

Ernest R. Schroeder
Bryan, Nelson, Allen,
Schroeder and Backstrom
Attorneys at Law
P O Drawer 1529
1103 Jackson Avenue
Pascagoula,MS 39567

City Products Corporation Policy SR 82,900 Claim on Lloyd M. Crenshaw

Dear Mr. Schroeder:

We have your recent letter requesting that we review Mr. Crenshaw's file.

This policy is an Accident only policy defining injury as:

> "Injury wherever used in this policy means bodily injury causing the loss while this policy is in force, directly and independently of all other causes and effected solely through an accidental bodily injury to the insured person."

In reviewing the file we can find no evidence linking Mr. Crenshaw's reported injury of January 6, 1979 to the loss of his right foot.

Our information shows that Mr. Crenshaw presented himself to the medical center at Keesler Air Force Base with a complaint of pain in his right foot. The admitting examination reveals a heavy smoker with a cold, pain, paresthetic, right foot with absent distal pulses. An anterior compartment syndrome would affect only the anterior tibial artery and dorsal pedal pulse. The posterior tibial artery is the major artery to the foot and this was occluded producing the physical findings and the resultant ampu-

tations of the lower extremity. This was confirmed by the pathology report. The operative report indicates the obstructing arteriosclerotic area most likely is in the famoro popliteal artery area although no mention of the femoral or popliteal pulses is noted.

In order to reconsider this claim, we must have some substantiation that an injury caused this loss "directly and independently of all other causes."

If this information is forthcoming, we will be happy to review this file.

Sincerely,

William Herzau, Supervisor
Special Risk Benefits Department
BB:er

INSTRUCTION NO. P-19A—GIVEN—filed December 3, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

No. 11,292

LLOYD M. CRENSHAW

Plaintiff

versus

BANKERS LIFE AND CASUALTY COMPANY

Defendant

INSTRUCTION NO. P-19A

The Court instructs the Jury that an insurer is obligated to deal in good faith and fairly with its insured in handling their claims, and to refrain from abuse, gross negligence, malice or fraudulent conduct.

If the handling of an insured's claim is attended by abuse, gross negligence, malice or fraudulent conduct, an independent tort (wrong) may arise, separate from breach of contract, for which punitive damages are recoverable.

Punitive damages are not awarded to compensate the injured party but are allowed in addition to compensatory damages. Punitive damages are granted, therefore, to punish the wrongdoer as an example, to deter the wrongdoer and others from committing similar offenses in the future, and to reward the injured party for his public service in bringing the wrongdoer to account.

They are never awarded to benefit the injured party, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of the public.

If you find from a preponderance of the evidence if any that punitive damages are warranted, you may take into account the financial status of the defendant, Bankers Life and Casualty Company.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

No. 11,292

LLOYD M. CRENSHAW

Plaintiff

VS

BANKERS LIFE AND CASUALTY COMPANY

Defendant

JURY INSTRUCTION NO. D-1

The Court instructs the July that if you believe from a preponderance of the believable evidence in this case that Bankers Life and Casualty Company had a legitimate or an arguable reason for refusing to pay the claim made by Lloyd M. Crenshaw, then you may not return a verdict for him which includes punitive damages.

The Court instructs you that any award of punitive damages to Lloyd M. Crenshaw must be based on a finding, from a preponderance of the believable evidence in this case, that at the time Bankers Life and Casualty Company denied Lloyd M. Crenshaw's claim, it did not have a legitimate or arguable reason for doing so and that, in denying the claim, Bankers Life and Casualty Company was guilty of such gross and wanton misconduct as to amount to an independent wrong against Lloyd M. Crenshaw.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

No. 11,292

LLOYD M. CRENSHAW

Plaintiff

VS.

BANKERS LIFE AND CASUALTY COMPANY

Defendant

JURY INSTRUCTION NO. D-7

The Court instructs the Jury that if you believe from a preponderance of the evidence presented in this case that the basis of the Defendant's denial of Lloyd M. Crenshaw's claim for benefits was based on a reasonable medical opinion, that Lloyd M. Crenshaw's alleged accident to his foot had no medical correlation to the surgery performed, then you must find that the Defendant had an arguable basis for the denial of benefits and you further cannot hold the Defendant accountable for punitive damage, even though you might ultimately find Lloyd M. Crenshaw to be entitled to the full policy benefits.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

No. 11,292

LLOYD M. CRENSHAW

Plaintiff

VS.

BANKERS LIFE AND CASUALTY COMPANY

Defendant

JURY INSTRUCTION NO. D-8

The Court instructs the Jury that if you find from a preponderance of the evidence in this case that Lloyd M. Crenshaw's surgery was required solely because of arteriosclerosis and not due to any trauma which he might have suffered, then the surgery is not compensable under the policy of insurance and your duty will be to return a verdict for the Defendant.

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF APPELLANT

*THEODORE B. OLSON
LARRY L. SIMMS
TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Appellant

**Counsel of Record*

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL

COPELAND, COOK, TAYLOR
& BUSH
Post Office Box 2132
Jackson, Mississippi 39225
(601) 354-0123

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether the $1,600,000 punitive damage award against appellant on an insurance claim of $20,000 violates the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, and is otherwise invalid under the Contract Clause and the Due Process Clause of the Fourteenth Amendment, because it is vastly out of proportion to any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities, and because it was imposed under a standard of conduct newly formulated by the court below in this case and applied retrospectively to conduct that occurred years before that standard of conduct was announced.

2. Whether *Miss. Code Ann.* § 11-3-23 (Supp. 1986) under which a mandatory penalty of fifteen percent of any money judgment is automatically imposed on an unsuccessful appellant irrespective of the meritoriousness of the appeal, but which imposes no corresponding burden on completely frivolous appeals filed by plaintiffs who fail to recover money judgments or who cross-appeal when dissatisfied with the size of a money judgment in their favor, is unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.*

---

* All parties to this case are named in the caption. Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of appellant: Bankers Life and Casualty Company is the wholly owned subsidiary of I.C.H. Corporation; Bankers Life and Casualty Company has controlling interest in, but does not wholly own, the Western Life Assurance Company.

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BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi dated September 11, 1985, and opinions dissenting, are reproduced in Appendix A of the Appendix to the Jurisdictional Statement, J.S. App. 1a-101a, and are reported at 483 So.2d 254 (Miss. 1985). That court's order of the same date affirming the trial court's judgment and assessing a fifteen percent penalty against appellant is reproduced at J.S. App. 102a and is unreported. That court's order dated February 26, 1986, denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Judgment is reproduced at J.S. App. 103a and is unreported. The order and judgment of the Circuit Court of Jackson County, dated December 3, 1981, is reproduced at J.S. App. 104a-105a and is unreported; the Circuit Court issued no opinion.

JURISDICTION

The Court has appellate jurisdiction over this case and Question 2 under 28 U.S.C. § 1257(2) because the September 11, 1985 order of the court below imposing a $243,000 appeal penalty on appellant, and the February 26, 1986 order denying appellant's Petition for Rehearing and overruling its Motion to Correct Judgment necessarily upheld the constitutionality of the statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1986), pursuant to which the $243,000 appeal penalty was imposed. This Court has jurisdiction to decide Question 1 as an adjunct to its appellate jurisdiction over Question 2, *see Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and pursuant to 28 U.S.C. § 1257(3).

The substance of appellant's challenge to the excessiveness of the punitive damage award as raised in Question

1 was presented to the trial court below in post-trial proceedings, that court holding that it was without authority to reduce the punitive damage award. J.S. App. 51a-52a, 59a, 483 So.2d, at 278-79, 281. On direct appeal, appellant renewed its post-trial challenge to the excessiveness of the $1,600,000 award and invoked for the first time the Due Process Clause of the Fourteenth Amendment. J.S. App. 124a-136a. The court below rejected appellant's challenge to the excessiveness of the award without mention of appellant's express reliance on the federal constitution.

Appellant renewed its federal constitutional challenge to the excessiveness of the award in its Petition for Rehearing, arguing the lack of any "rational relationship between the size of the punitive damage verdict and any legitimate purpose," J.S. App. 151a, and that the punitive damage award "constitutes an excessive fine, violates due process, equal protection and other constitutional standards." In addition, appellant argued that the punitive damage award had been sustained only by virtue of the adoption by the majority of the court below of a new legal standard formulated in this case and applied retrospectively to appellant's conduct, which had occurred years before. J.S. App. 143a-148a.

These articulations of appellant's federal claims in the context of appellant's express reliance on the Due Process Clause of the Fourteenth Amendment, while perhaps inartful, confer jurisdiction over Question 1, which "does not depend on citation to book and verse." *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982). Any suggestion that the substance of Question 1 was not timely presented is foreclosed by *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). This appeal was docketed on April 25, 1986, within the ninety-day period for docketing appeals. The Court noted probable jurisdiction on March 9, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and *Miss. Code Ann.* § 11-3-23 (Supp. 1986), are as set forth in the appendix to this brief. App., *infra*, 1a.

STATEMENT OF THE CASE

A Mississippi jury determined that appellant Bankers Life and Casualty Company ("Bankers Life") breached a contractual obligation to appellee Lloyd M. Crenshaw when it failed to pay him $20,000 for accidental loss of limb under a group insurance policy. Punitive damages in the amount of $1,600,000 were also awarded. An additional $243,000 penalty was imposed by the Supreme Court of Mississippi under a Mississippi statute which automatically adds fifteen percent to the judgment against unsuccessful money-judgment appellants. Appellant is also liable for post-judgment interest on the verdict and costs on appeal.

Mr. Crenshaw's leg was amputated below the knee on January 18, 1979. At the time, he was an insured under a policy issued by Bankers Life to his employer, White Stores, a Pascagoula, Mississippi, subsidiary of City Products Corporation. That policy provided a $20,000 benefit for loss of a limb due to accidental bodily injury. The dispute between Mr. Crenshaw and Bankers Life revolved around whether his amputation was attributable to an accident or to degenerative arteriosclerotic disease.

The first medical record of Mr. Crenshaw's alleged injury was on January 9, 1979, when he visited a hospital complaining of pain in his right foot. He testified that he had injured himself on January 6, 1979 when his car's alternator, on which he had been working, "rolled off his work bench and struck the front part of his right foot." J.S. App. 2a, 483 So.2d, at 257.

Mr. Crenshaw's condition apparently deteriorated rapidly after his first hospital visit. He was sent home with a splint and analgesics on January 9, but returned to the hospital again on January 11, 12 and 14. On the 14th, Mr. Crenshaw's physicians admitted him to the hospital and recommended amputation of part of his leg. The surgery was performed on January 18. His surgeon entered a finding that Mr. Crenshaw had "an ischemic right foot with necrosis of the distal aspect." J.S. App. 7a, 483 So.2d, at 258. The pathology report of January 22 concluded in pertinent part: "SEVERE ARTERIOSCLEROSIS OF THE ARTERIES. GANGRENOUS NECROSIS." J.S. App. 8a, 483 So.2d, at 259.

Mr. Crenshaw filled out a Bankers Life proof of claim in April of 1979 which was submitted to the insurer along with certain of Mr. Crenshaw's hospital records, including operation and pathology reports and a narrative summary. J.S. App. 10a, 483 So.2d, at 260.

Mr. Crenshaw's claim under the policy was initially declined by Bankers Life in June of 1979 based upon the opinion of its Medical Director, Dr. Nathaniel P. McParland, a board certified specialist in general and vascular surgery, J.S. App. 64a-65a n.1, 483 So.2d, at 284 n.1 (Robertson, J., dissenting), who relied "on the three medical entries Crenshaw sent with [Mr. Crenshaw's] claim . . . ." J.S. App. 33a, 483 So.2d, at 270. Dr. McParland noted "the absence of the record of the original injury" and concluded that "Mr. Crenshaw's loss of limb was . . . because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and necrosis." J.S. App. 11a, 483 So.2d, at 260.

In response to subsequent communications from Mr. Crenshaw's physicians and attorney stating that trauma was the "precipitating event" which caused his gangrenous necrosis, J.S. App. 14a-17a, 483 So.2d, at 261-64, Bankers Life again declined the claim. Dr. McParland continued to

believe "there was either no trauma or the trauma was insignificant." J.S. App. 20a, 483 So.2d, at 264.

Mr. Crenshaw filed a complaint seeking $20,000 actual and, as amended, $1,635,000 punitive damages. J.S. App. 21a, 483 So.2d, at 264.

Three physicians testified at the trial. A general surgeon testified that "the precipitating cause [for Mr. Crenshaw's amputation] was trauma, probably combined with arteriosclerosis of a severe nature." J.S. App. 21a, 483 So.2d, at 265. The surgeon who performed the amputation acknowledged that Mr. Crenshaw's problems could have been unrelated to trauma. However, he was of the opinion that trauma "aggravated a pre-existing condition which led to loss of the extremity." J.S. App. 23a, 483 So.2d, at 265-66. Dr. McParland testified that arteriosclerosis "alone caused the amputation," J.S. App. 26a, 483 So.2d, at 267, and that "trauma had nothing to do" with Mr. Crenshaw's problem. J.S. App. 27a, 483 So.2d, at 267.

The case was tried before a jury in the Circuit Court in Jackson County, Mississippi commencing on December 1, 1981. On December 3, the jury returned a verdict in favor of Mr. Crenshaw for $20,000 actual and $1,600,000 punitive damages.

The jury verdict was affirmed by the Supreme Court of Mississippi on September 11, 1985. Six justices of the nine member court joined in an opinion upholding the liability of Bankers Life to Mr. Crenshaw for compensatory and punitive damages. Five of those justices rejected Bankers Life's argument that the $1,600,000 punitive damage award was excessive. Three justices dissented on the issues of liability and damages. One justice, the author of the court's opinion on liability, dissented on the ground that the "$1,600,000 punitive damage award was grossly excessive." J.S. App. 54a, 483 So.2d, at 279 (Hawkins, J., dissenting).

The majority below, in affirming the liability of appellant for punitive damages, rationalized its conclusions in terms of previous Mississippi Supreme Court opinions but actually sustained liability on the basis of a previously unarticulated standard and materially lower threshhold. Thus, the majority noted that punitive damages "may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." J.S. App. 29a, 483 So.2d, at 269. In addition, the court below had previously held that an insurer would not be liable for punitive damages if it had an "arguable reason" under *Standard Life Ins. Co. of Indiana* v. *Veal*, 354 So.2d 239, 248 (Miss. 1977), or a "reasonably arguable basis" under *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Campbell*, 466 So.2d 833, 842 (Miss. 1984), for failing to pay a claim. J.S. App. 31a, 483 So.2d, at 269. Notwithstanding these standards, the punitive damage award against appellant was upheld despite appellant's reliance in denying the claim on the opinion of its indisputably qualified expert and medical director. As the dissenting justices observed, "the law is and ought to be that reliance upon the opinion of a qualified expert physician or surgeon should as a matter of law furnish an insurer an arguable reason for refusal to pay a claim." J.S. App. 79a, 483 So.2d, at 291 (Robertson, J., dissenting) (footnote omitted).

The court below rejected Bankers Life's "arguable basis" because the "reason [Bankers Life] gave [Mr. Crenshaw] was not what their doctor had said . . . ." J.S. App. 39a, 483 So.2d, at 273. Relying on a decision from another state subsequently vacated (on other grounds) by this Court, the court below held that the issue was not what the insurer's expert actually determined prior to denial of the claim, the insurer's actual reason for denying the claim, or the basis for denying the claim advanced by the insurer at trial, "but the reason it gave Crenshaw for denying the claim. See: *Aetna Life & Casualty Co., Inc. v. Lavoie*, 470

So.2d 1060 (Ala. 1985 [sic])." J.S. App. 40a, 483 So.2d, at 273. Therefore, because Bankers Life had communicated to Mr. Crenshaw an explanation for denying the claim which was legally unacceptable in Mississippi, "it [had] a final duty to promptly honor [the claim]." J.S. App. 46, 483 So.2d, at 276. Because it did not, the court declared, "[p]unitive damages in such a case is an appropriate, and perhaps the only remedy." J.S. App. 47a, 483 So.2d, at 276.

The dissent pointed out that since Bankers Life's defense to the contract claim was sufficient to send to the jury, the punitive damage claim should not, under Mississippi precedent, have been given to the jury. J.S. App. 63a, 483 So.2d., at 283. And, the dissent observed, the majority decision ignored the standard pursuant to which punitive damages can be assessed in Mississippi. *Id.*

As to damages, the court below held that the amount of punitive damages should be determined based upon the amount necessary to punish and deter the defendant, to deter others, and the "pecuniary ability or financial worth of the defendant." J.S. App. 50a, 483 So.2d, at 278. The court determined that the jury's "sole discretion" with respect to an appropriate punitive award should be disturbed only when the award evinces passion, bias and prejudice on the part of the jury so as to "shock the conscience." "This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court." J.S. App. 51a, 483 So.2d, at 278. The court held that "[h]owever high [a $1,600,000 award] may 'seem,' " an award amounting to less than one percent of the financial net worth of a defendant could not "shock the judicial conscience." J.S. App. 52a, 483 So.2d, at 279.

SUMMARY OF ARGUMENT

Punitive damages are authorized by courts and awarded by juries to serve the governmental function of punishing

conduct which is perceived as antisocial in order to achieve the goals of retribution and deterrence. As such, their application and exaction are subject to constitutional protections from arbitrary governmental conduct and excessive punishments.

In our society, broad public standards of conduct are typically developed and pronounced by legislative chambers for prospective application. Where penal sanctions are utilized to enforce these standards and advance the public welfare, the laws defining the prohibited behavior must do so with reasonable clarity. The punishments ordained for deviation from such standards must be clear and predictable. Where a financial penalty is exacted to punish a wrongdoer and deter similar conduct in the future, the range of financial sanctions is determined legislatively and announced publicly in advance of their imposition. These penal standards are enforced by officers of the government to ensure accountability, reasonable uniformity, and consistency with long-term public interests. Financial penalties extracted to serve public ends are collected for public use.

In the process described in the foregoing paragraph, constitutional protections developed over seven centuries of English and American law are applied to protect the accused and the convicted from arbitrary, unfair, uneven, excessive and capricious governmental action.

Punitive damages as they are applied and imposed in this country are inconsistent in virtually every respect with the foregoing procedures and constitutional restrictions on unpredictable and extreme governmental conduct. They are imposed for transgressions of vague, elusive and retrospectively applied standards. Punitive damage awards may vary from a few thousand to a few billion dollars without discernible or predictable explanation. Punitive damages reward plaintiffs indiscriminately and impose crushing financial burdens for the most whimsical of reasons.

The Constitution contains protections from excessive governmental punishments drawn almost verbatim from English constitutional provisions which date to Magna Carta. Magna Carta's limitations, the prohibitions of the English Bill of Rights, and the restrictions of the Eighth Amendment were intended to apply to excessive and disproportionate exactions whether imposed in criminal or civil cases if the purposes for their exaction are punishment and deterrence.

Fines or penalties, civil or criminal, are excessive if they are out of proportion to legislatively developed standards adopted after deliberation by elected representatives to apply with uniformity to all similarly situated wrongdoers. The excessiveness of a penalty may be measured by the standards established by our institutions of government charged with the primary responsibility to create rules of conduct and reasonable modes of punishment.

Punitive damages are also subject to traditional standards of due process. While compensatory damages may perhaps be justified even in instances of retroactively imposed legal standards, punishments must be predicated upon foreseeable standards and known penalties.

Mississippi's appeal penalty statute erects a discriminatory barrier to that State's appellate courts which has the effect of discouraging legitimate appeals by one class of litigants while exempting frivolous appeals by others. It cannot survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I

THE $1,600,000 PUNITIVE DAMAGE AWARD VIOLATES APPELLANT'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

A. The Nature Of The Alleged Wrong And The Characteristics Of The Punitive Damage Sanction

Mr. Crenshaw sought recovery in the courts of Mississippi of $20,000 to which he believed he was entitled pursuant to a contract of insurance. On that claim for breach of contract he engrafted an action for punitive damages for the tort of "bad faith" failure to pay his insurance claim. The courts of Mississippi and many other States have authorized such a proceeding where the plaintiff can allege and prove that the "breach of contract was 'attended by some intentional wrong, insult, abuse, or gross negligence . . . .' " *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op., at 7, 107 S. Ct. 1549, 1554 (1987), *quoting American Railway Express Co.* v. *Bailey*, 142 Miss. 622, 631, 107 So. 761, 763 (1926).

Although the proponents of the bad faith tort (and other forms of punitive damage actions) attribute to it a broad range of societal goals, the bad faith tort has been recognized by this Court as nothing "more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available under [state] contract law." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 217 (1985). Thus, appellee has taken advantage of what has been described as the "tortification of contract law," M. Peterson, S. Sarma & M. Shanley, *Punitive Damages* iv (Rand Institute for Civil Justice 1987) ("Rand Report"), under which punitive damages imposed in a civil action rather than a criminal fine imposed in the criminal justice system are employed by the government,

through the court system, to punish and deter conduct perceived to be antisocial. Such interchangeable use of the tort or penal law is not new: "the penal law of ancient communities . . . is the law of wrongs, or, to use the English technical word, of torts." H. Maine, *Ancient Law* 370 (1861).

The penal nature of the $1,600,000 award which was made to appellee was affirmed by the court below:

> [O]ur law would seem to authorize a quantum of punitive damages . . . reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses . . . .

J.S. App. 50a, 483 So.2d, at 278.

If a common law rule, like a statute, "imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal." *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (Warren, C.J.) (plurality opinion) (footnote omitted). Because they are penal in nature, punitive damages have been characterized by the Court as "private fines levied by civil juries." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Indeed, as Justice Marshall observed in dissent in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971), punitive damages "serve the same function as criminal penalties and are in effect private fines."

This transfer to private litigants and civil juries of the power to exact extra-compensatory penal sums renders punitive damages an "anomaly" in "our legal system," in which a

> fundamental premise . . . is the notion that damages are awarded to *compensate* the victim—to redress the injuries that he or she *actually* has suffered. In sharp contrast to this principle, the doctrine of punitive damages permits the award

> of "damages" beyond even the most generous and expansive conception of actual injury to the plaintiff.

Smith v. *Wade*, 461 U.S. 30, 57-58 (1983) (Rehnquist, J., dissenting) (citations omitted).

Punitive damages are anomalous in other important respects:

(1) The maximum amounts in which punitive damages may be assessed in most jurisdictions are, unlike other monetary punishments, not circumscribed by or determined according to meaningful legislative judgments.[1] Thus,

> [b]ecause juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial.

Electrical Workers v. *Foust*, 442 U.S. 42, 50 (1979) (citations omitted). *See also Gertz* v. *Robert Welch, Inc.*, 418

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[1] State statutes expressly authorizing the award of punitive damages typically do nothing more than grant *carte blanche* to juries to award such damages in any amount thought appropriate by each jury. *See, e.g., Nev. Rev. Stat.* § 41.333 (1985). Federal statutes expressly authorizing punitive damages sometimes establish limits on the size of punitive awards, *see, e.g.*, 12 U.S.C. § 1723a(e) (punitive damages "not exceeding $100 for each day during which such violation is committed"); 42 U.S.C. § 3612(c) ("not more than $1,000 punitive damages" for violation of fair housing laws); 15 U.S.C. § 1691e(b) (punitive damages no greater than $10,000 or, in class action case, no greater than the *lesser* of $500,000 or one per cent of net worth of defendants), but often fail to do so, *see, e.g.*, 11 U.S.C. § 303(i)(2)(B); 15 U.S.C. § 1681n(2). These federal statutes demonstrate that when legislative judgment is brought to bear in a meaningful way on the quantum of punishment appropriate to achieve the purposes of punishment and deterrence, the maximum levels established bear no comparison with the arbitrary and enormous punitive fines imposed by juries which have been freed to establish their own, one-time "system" of administering punishment.

U.S., at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

(2) The diverse social objectives purportedly furthered by the imposition of punitive damages do not include reparation for injuries done to the plaintiff. Yet, the plaintiff is the beneficiary of society's exaction from the defendant. The plaintiff fulfills the classic role of a prosecutor; indeed, punitive damages are sometimes "justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights." *Smith* v. *Wade*, 461 U.S., at 58 (Rehnquist, J., dissenting). *See also* J.S. App. 29a, 483 So.2d, at 269. But under this system, the prosecutor—rather than being paid in proportion to his services—receives the fine which "should go to the State . . . ." 461 U.S., at 59 (Rehnquist, J., dissenting).

(3) Punitive damages are often based, in part, upon the "pecuniary ability or financial worth of the defendant." J.S. App. 50a, 483 So.2d, at 278. Therefore, the size of the award will often depend less on the seriousness of the harm to society caused by the defendant's conduct and more on the wealth of the defendant. Punitive damages may also, as observed by the Court, "be employed to punish unpopular defendants." *Electrical Workers* v. *Foust*, 442 U.S., at 50-51 n.14.

(4) Punitive damages are awarded without discernible standards and are random, capricious, often excessive and invariably unpredictable. Because punitive damage awards as such have never been subjected to constitutional constraints other than those of the First Amendment,[2] they

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[2] Early in its history, this Court confirmed that, as a matter of state law, punitive damages could be made available in certain types of common law actions because such damages were available under English common law. *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). However, neither in *Day* nor in any other case has the Court ever

remain an isolated bastion of arbitrariness in the imposition of punishment in our judicial system, their imposition being "frequently based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting).

(5) Finally, given the purely penal nature of punitive damages, there is no doubt that the size of an award and the circumstances of its imposition would be subject to constitutional scrutiny under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment if imposed by a court following a defendant's conviction in a criminal case. For example, if appellant had been convicted in the courts of Mississippi for engaging in an "unfair or deceptive act or practice in the business of insurance" as prohibited by *Miss. Code Ann.* § 83-5-33 (1972), its trial would have been accompanied by the full panoply of procedural safeguards accorded to criminal defendants. More importantly, the maximum fine which could have been assessed upon conviction would have been $1,000. *Miss. Code Ann.* § 83-5-85 (1972).[3]

Appellant's civil trial was, of course, "unaccompanied by the types of safeguards present in criminal proceedings." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J.,

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considered how provisions of the federal constitution might be applicable to punitive damage awards except in the context of cases challenging their imposition in libel actions. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

[3] This statute makes it a misdemeanor to violate any provision of the insurance laws of Mississippi and imposes a maximum fine of $1,000 upon conviction. Other statutes of Mississippi are directed to misconduct by insurance agents and generally provide for a maximum fine of $500 along with a term of imprisonment. *See Miss. Code Ann.* § 83-17-1 (1972). No Mississippi statute would appear expressly to punish bad faith failure to pay an insurance claim as such.

dissenting). And, in the absence of these safeguards, a fine 1,600 times the maximum fine authorized by the Mississippi legislature for *any* offense arising out of the day-to-day conduct of insurance business in Mississippi was imposed on appellant.

This combination of anomalies under which appellant had the worst of both worlds—civil process and exposure to a potentially unlimited fine, places in perspective the peculiar characteristics of punitive damages in our legal system. Furthermore, the punitive damage "anomaly" is out of control and is having a major impact on our legal system. In California between 1980 and 1984,

> [t]he median punitive damage award in bad faith actions was $336,000. . . . The average was $1.6 million in California, primarily because bad faith awards in Los Angeles County averaged over $3 million.

Rand Report, at vii. "Between 1980 and 1984 punitive damages were awarded in more than one out of every eight jury trials (13.6 percent) in San Francisco in which a defendant was found liable for compensatory damages." *Id.*, at 9. During the same period in California "punitive damages were assessed against 35 percent of defendants who were found to have breached contracts." *Id.*, at viii.

The trend is also clear. In Cook County, Illinois, "[o]ver six times as much money was awarded in punitive damages between 1980 and 1984 as was awarded during the previous twenty years combined." *Id.*, at 14. During the same period, "[j]urors in California awarded a total of $311 million in punitive damages . . . ." *Id.*, at 42.

Punitive damage awards have stepped into the role historically performed by the criminal law—punishment and deterrence—and have even begun to assume some of the frightening characteristics of the penal system of medieval England. Because punitive damages perform the functions

of punishment in our society, their imposition must in turn be subjected to the constraints of the Excessive Fines Clause of the Eighth Amendment.

B. The Excessive Fines Clause Is Applicable To Punitive Damage Awards Rendered In Civil Cases

But for the fact that the Excessive Fines Clause appears in an amendment that is, on its face, concerned with subjects—"bail" and "cruel and unusual punishments"—which are commonly associated with criminal rather than civil cases,[4] the plain language of the Excessive Fines Clause could reasonably be interpreted, as a matter of first impression, to be fully applicable to any monetary "fine" imposed in any civil or criminal proceeding irrespective of whether the purposes of such a "fine" were limited to punishment and deterrence.[5] Appellant's submission does not, however, rest upon such a broad assertion. Rather, this case presents the narrow question whether a monetary fine imposed exclusively for the purposes of punishment and deterrence—the classic objectives of the *criminal* law, *see, e.g., Trop* v. *Dulles*, 356 U.S., at 96, would have been intended by the Framers of the Excessive Fines Clause to be within the protection of that Clause. Although, as discussed below, express evidence of the Framer's intent with respect to the meaning of "fine" in that Clause is

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[4] The Court observed in *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), "[b]ail, fines, and punishment traditionally have been associated with the criminal process . . . ." The Court has, however, squarely assumed the applicability of the Excessive Bail Clause in civil cases, *Carlson* v. *Landon*, 342 U.S. 524, 544-46 (1952), thus illustrating that the principles of the Eighth Amendment are not confined to "criminal" cases.

[5] Because, as demonstrated *infra*, modern-day punitive damage awards are the equivalent of amercements and fines under English law, they are clearly within the meaning of the term "fines" as that term was used by the Framers of the Eighth Amendment whether or not the term "fines" would be construed to comprehend the imposition of monetary exactions for purposes other than punishment and deterrence.

scant, the probable intent that may be gleaned from the congressional debates is fully consistent with application of the Excessive Fines Clause to punitive fines imposed in civil actions. Furthermore, more than five centuries of English legal history and practice inherited and understood by the Framers establish that they would have contemplated modern-day punitive damage awards as within the ambit of the Excessive Fines Clause.

1. *The Framers' Placement Of The Excessive Fines Clause In The Eighth Amendment Was Not Intended To Limit Its Applicability To Criminal Cases*

The substantive debate in the First Congress regarding the proposed Eighth Amendment was brief and inconclusive.[6] Standing alone, it is neutral regarding whether the First Congress intended the Excessive Fines Clause or,

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[6] Mr. Smith, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.

Mr. Livermore—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the clause, and it was agreed to by a considerable majority.

1 *Annals of Congress* 754 (Gales & Seaton eds. 1834).

indeed, the Eighth Amendment in its entirety, to be limited solely to criminal cases. However, applicability of the Eighth Amendment beyond purely criminal cases is a reasonable inference because of the debate and decisionmaking involving the Fifth Amendment, which immediately preceded the Eighth Amendment debate. These two proposed amendments comprised successive clauses (the fifth and sixth clauses) of the "fourth proposition." 1 *Annals of Congress*, note 6 *supra*, at 753. During the debate over the fifth clause (ultimately the Fifth Amendment), an amendment to that clause was offered and adopted to add the words "in any criminal case" in order to ensure that the part of that clause dealing with the issue of self-incrimination would "be confined to criminal cases . . . ." *Id.* Thus, the First Congress clearly knew how to confine provisions of the Bill of Rights to criminal cases if it wanted to do so, and the Fifth (and Sixth) Amendment is ample evidence that when the Framers so intended, they carried out their intentions expressly. At the very least, this history gives rise to a presumption that the Eighth Amendment's protections from excessive or extreme governmental punishments are available irrespective of whether the context in which they may be imposed is technically civil or criminal.[7] As discussed below, this Court's Eighth Amend-

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[7] This presumption is of no less force because the prohibitions on excessive bail, excessive fines and cruel and unusual punishments were joined together in the Eighth Amendment. That joinder can be traced to the joinder of these same prohibitions in the English Bill of Rights of 1689. As discussed in part I.B.4. *infra*, the prohibition of excessive fines in the English Bill of Rights merely incorporated the prohibition of excessive amercements contained in Magna Carta, a prohibition which was fully applicable to punitive fines imposed in civil proceedings. There is no evidence that, in incorporating Magna Carta's prohibition of excessive amercements, Parliament intended to limit that prohibition to criminal cases. Furthermore, the problem of excessive fines was addressed separately from the problem of excessive bail and cruel and unusual punishments in colonial and state declarations which later, *see* part I.B.3. *infra*, became models for the Eighth Amendment. *See, e.g.*,

ment jurisprudence is fully consistent with this presumption.

2. *The Excessive Fines Clause Is Not Limited To Fines Imposed As The Result Of A Criminal Conviction*

A decade ago, this Court was unanimously of the view that:

> Some punishments, though not labeled "criminal" by the State, may be sufficiently analagous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.

Ingraham v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J., dissenting). Almost fifteen years earlier, the Court had struck down a federal statute under that same principle in a case raising issues under the Fifth and Sixth Amendments. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963).

Punitive damages are similarly not labeled "criminal," but in theory and practice they are completely "analogous to criminal punishments" because, as discussed above, they serve precisely the same purposes as criminal punishments. When the State of Mississippi placed in the sole discretion of the jury the power to punish appellant by imposing punitive damages, it quite literally "entrusted [the jury] with the criminal-law function of government." 430 U.S., at 664. Thus, if this $1,600,000 award is a "fine" within the meaning of that term in the Excessive Fines Clause, it is subject to the prohibition that it not be "excessive."

Massachusetts Body of Liberties of 1641, § 18 (bail), § 37 (fines) and § 46 (inhumane, barbarious or cruel punishments), *reprinted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 73-74, 76, 77 (1971). Thus, it appears that the joinder of these three prohibitions is nothing more than an historical accident carrying no substantive significance for purposes of interpreting the Excessive Fines Clause.

As the following discussion will demonstrate, the punitive damage award in this case is legally indistinguishable from monetary punishments imposed under English common law for more than five centuries prior to the ratification of the Eighth Amendment. The quanta of these monetary punishments were constrained as regards their excessiveness by the direct lineal antecedents of the Eighth Amendment—chief among them the amercements clauses of Magna Carta. These constraints were well known to the colonists and were incorporated into the Excessive Fines Clause.

3. *The Eighth Amendment Preserves In The United States The Same Rights As Were Enjoyed By Englishmen And The Colonists*

Although the extant "legislative history" of the Eighth Amendment is, as noted above, scant if that history is limited to the debates in the First Congress, this Court has repeatedly looked to the English antecedents of the Eighth Amendment—primarily Magna Carta and the English Bill of Rights of 1689—to determine the substantive content of that amendment. In summarizing the nature of this reliance, the Court, in *Solem* v. *Helm*, 463 U.S. 277, 286 (1983), stated:

> Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

Solem involved the issue of incarceration disproportionate to the offense involved under the Cruel and Unusual Punishments Clause. Thus, the Court had no occasion in *Solem* to consider *directly* the substantive content of the Excessive Fines Clause. The *Solem* Court did, however, make clear that the substantive content of the Eighth

Amendment and its equivalent in the English Bill of Rights of 1689 incorporated directly the rights which Englishmen had enjoyed under Magna Carta since 1215. Specifically, the Court held that Magna Carta's principle "that a punishment should be proportionate to a crime" had been "repeated" in the provision of the English Bill of Rights of 1689 from which the Cruel and Unusual Punishments Clause of the Eighth Amendment was derived. That provision provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 463 U.S., at 285.

Even if the question whether Magna Carta's principle of proportionality had been incorporated in the "cruell and unusuall Punishments" provision of the English Bill of Rights of 1689 were debatable,[8] there can be no doubt that Magna Carta's principle of proportionality was incorporated in the provision prohibiting "excessive fines," because the concept of excessiveness on its face connotes proportionality.

As indicated in *Solem*, in defining and asserting their rights as Englishmen the colonists in the 17th and 18th Centuries turned primarily to two documents, Magna Carta and the English Bill of Rights of 1689. *See* H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," in *Magna Carta Commemoration Essays* 182 (H. Malden ed. 1917). The influence of the English Bill of Rights of 1689 is clear. The language of the Eighth Amendment is taken verbatim from the Virginia Declaration of Rights of 1776, which in turn was taken from

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[8] Although the dissent in *Solem* v. *Helm* expressed doubt that the "cruell and unusuall Punishments" clause in the English Bill of Rights of 1689 had been intended to incorporate Magna Carta's principle of proportionality, *see* 463 U.S., at 312 (Burger, C. J., dissenting), the dissent did not suggest that Magna Carta's principle of proportionality had not been incorporated in the "excessive fines" clause of the English Bill of Rights.

the English Bill of Rights of 1689. *See Solem* v. *Helm*, 463 U.S., at 285 n.10. This same basic formulation in the Eighth Amendment had also been adopted in 1776 in the Declarations of Rights of Maryland, North Carolina and Delaware in addition to Virginia's Declaration of Rights.[9]

The colonists, including the Framers of the Eighth Amendment, understood that the English Bill of Rights of 1689 was only one expression of their rights and liberties as Englishmen and that the rights declared in that document were by and large reenactments of rights previously recognized, "including the rights and liberties secured by Magna Carta and its confirmations." H. Hazeltine, *supra*, at 189-90 (footnote omitted).[10] Thus, in some of the colonies the concept of proportional monetary punishments was captured in language taken directly from Magna Carta. For example, the Pennsylvania Declaration of Rights of 1776 provided that "all fines shall be moderate," 1 B. Schwartz, note 7 *supra*, at 272, which was merely a shortened version of Section XVIII of the Pennsylvania Frame of Government of 1682, which provided that "all fines shall be moderate, and saving men's contenements, merchandize, or wainage."[11]

This language embodying the concept of proportionality and engrafting on that concept the notion that a fine could not, even if proportional to the offense, destroy the defendant's ability to function usefully within the economy was taken directly from Magna Carta. Magna Carta dealt

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[9] 1 B. Schwartz, note 7 *supra*, at 282 (Maryland), 287 (North Carolina), 278 (Delaware).

[10] The Framers and colonists understood that the English Bill of Rights of 1689 "was a summing up, as it were, and final establishment of the Legal bases of the [English] Constitution." T. Taswell-Langmead, *English Constitutional History* 519 (6th ed. 1905).

[11] 1 B. Schwartz, note 7 *supra*, at 141. The Pennsylvania Frame of Government of 1682 has been described as "the most influential of the Colonial documents protecting individual rights." *Id.*, at 130.

with the problem of excessive monetary punishments in three separate chapters which will be referred to as the amercements clauses. The primary clause, Chapter 20, reads as follows:

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.[12]

The influence of Chapter 20 on the colonists is clear. As Pennsylvania had done, in its Constitution the State of South Carolina also relied directly on the concept of proportionality derived from the amercements clauses, providing that punishments should be "in general more proportionate to the crime." 1 B. Schwartz, note 7 *supra*, at 335. And as late as 1787, the Continental Congress incorporated Chapter 20's concept of moderation in the Northwest Ordinance, providing that "all fines shall be moderate." *Id.*, at 400.

This reliance on Magna Carta is even more marked in the 17th Century prior to the enactment of the English Bill of Rights of 1689. As in Pennsylvania prior to the Revolution, the colonies of Massachusetts and New York had utilized language from Chapter 20 of Magna Carta in their basic instruments by which their residents asserted

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[12] Magna Carta, ch. 20, *as quoted in* W. McKechnie, *Magna Carta* 284 (2d ed. 1958). Chapters 21 and 22 of Magna Carta applied the principles of Chapter 20 to barons and earls (ch. 21), and the clergy (ch. 22). *Id.*, at 295, 298.

the inherited rights of Englishmen. The Massachusetts Body of Liberties of 1641, adopted by the General Court, is of particular relevance because that document, like the Pennsylvania declarations, not only directly incorporated Magna Carta's concept of proportionality but also assumed the interchangeability of the terms "amercement" and "fine." Section 37 of that document provided authority in the courts to impose on an erring plaintiff "a proportionable fine to the use of the defendant . . . ." 1 B. Schwartz, note 7 *supra*, at 76. Five years later, Section 37 was declared by the General Court to be based directly on the amercements clauses of Magna Carta. A. Howard, *The Road from Runnymede* 404 (1968) (reprinting Massachusetts "Parallels of 1646," para. 7). The Massachusetts Body of Liberties is particularly noteworthy in its incorporation of Magna Carta's prohibition on excessive amercements in a context in which the fine was payable to the other private party rather than to the colony or, as in England, to the Crown. The New York General Assembly subsequently enacted the New York Charter of Libertyes and Priviledges of 1683. The paragraph of that document which addressed the problem of excessive fines was virtually a verbatim reenactment of Chapter 20 of Magna Carta. 1 B. Schwartz, note 7 *supra*, at 165.

These documents provide tangible evidence that the colonists, both before and after the Revolution, regarded Magna Carta and the English Bill of Rights of 1689 as sources of their individual liberties and that they were specifically aware of, and preserved in the Excessive Fines Clause, the prohibitions on excessive monetary punishments found in those documents. As appellant will demonstrate, modern-day punitive damage awards are virtually identical to amercements in theory and in practice and therefore would have been regarded by the Framers and the colonists as being controlled in their size by the Excessive Fines Clause.

4. *Punitive Damage Awards Are The Equivalent Of Amercements And Fines*

In Anglo-Saxon England, most wrongs were punished by requiring the wrongdoer to pay compensatory damages to the person wronged and at the same time to make a further payment which was "due to the community, on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim." W. McKechnie, note 12 *supra*, at 285. The maximum size of these further payments, known as "wites," was generally uniform, often being established by local rules. *Id.*

After the Norman Conquest in 1066, the Anglo-Saxon system of "wites" was gradually superseded by a system of payments known as amercements. This system was based on the same general theory that a civil wrong generated compensible harm to the public as well as to the wronged person: "offences against the established order were offences also against the King." *Id.*, at 80. However, a crucial difference in the amercement system was that an amercement was limited, at least in theory, only by the grace of the Crown—to whom the amercement was due, because commission of a civil wrong placed the wrongdoer totally at the mercy of the King, whose role was to reestablish the peace by dispensing his justice. *Id.*, at 286.

The amercement system was, over time, recognized by the Crown as an important and lucrative source of revenue, a recognition that resulted in the infliction of increasingly larger amercements. During the reign of John, these monetary penalties were converted into "instruments of extortion," *id.*, at 22, which became a major force behind the presentation of Magna Carta by the barons to King John on June 15, 1215.

Under Chapter 20 of Magna Carta, quoted in full above at p. 23, an amercement had to be "in accordance with the degree of the offence." This concept of proportionality was understood over the centuries as expressing a rela-

tionship between the amercement and the "wrong done to the lord or the court, and not the other party to litigation . . . ."[13] The punitive damage award in this case was "calculated" under precisely the same theory, being imposed for retributive and deterrent purposes rather than to compensate appellee.

Chapter 20 also imposed two additional restraints on the size of amercements which went beyond the concept that an amercement had to be proportional to the offense. Once an amercement was determined to be proportionate to the offense, even that amount could not finally be assessed unless, in the case of a freeman, payment of the amercement would "sav[e] always his 'contenement,' " and in the case of a merchant, "saving his 'merchandise.' " Finally, no amercement could be imposed "except by the oath of honest men of the neighbourhood"—the equivalent of today's jury. To these restraints was engrafted the additional power of the courts to pardon amercements altogether, usually a power exercised on the basis of the "poverty" of the person amerced. *See* W. McKechnie, note 12 *supra*, at 288.

The amercements clauses were popularly regarded as among the most important provisions of Magna Carta: "Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884).

The amercements clauses and Magna Carta's principle of proportionality applied to civil and criminal wrongs alike. Although over the next five centuries the term "amercement" gradually fell from common usage to be replaced

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[13] *See Nova Narrationes*, in 80 Selden Society cci (E. Shanks ed. 1963) (footnote omitted).

by the word "fine,"[14] the English "Constitution" required that such monetary exactions, however denominated, be reasonable in amount. Blackstone expressly recognized that amercements had historically been imposed as civil punishments regulated by the amercements clauses of Magna Carta in the same fashion as fines had come to be regulated in criminal cases after the separation of criminal and tort law in England had begun:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Carta*, concerning amercements for misbehaviour *in matters of civil right*.

4 W. Blackstone, *Commentaries on the Laws of England* *372 (footnote omitted) (emphasis added). In the 18th Century, Blackstone records no fewer than six circumstances involving private litigants in which the defendant, found liable, would have been required to pay a fine to the Crown as well as compensation to the plaintiff. *See* 3 W. Blackstone, *Commentaries on the Laws of England* *118-19, *138, *179, *188, *398, *402 (1768). As explained by Blackstone, the sum due to the Crown was assessed for the "public misdemeanor which is coupled with a private injury." *Id.*, at *398.

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[14] In the 13th Century, the term "fine" was used to denote a sum paid to the Crown or court as essentially a bribe or means of buying justice in advance of an adjudication. W. McKechnie, note 12 *supra*, at 292-93. The term "amercement," on the other hand, "signified the pecuniary mulct laid upon an individual who had offended the King." T. Taswell-Langmead, note 10 *supra*, at 92. Although not widely used in this country, the term "amercement" did find a place in patent law, as illustrated by the case of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944). In that case, Justice Roberts, in dissent, took the position that the Court's action in effectively reinstating a district court judgment holding a patent invalid resulted in a situation in which "the owner of the patent is to be amerced and in effect fined for the benefit of the other party to the suit . . . to punish one wrongdoer for the benefit of another . . . ." *Id.*, at 270.

5. *Modern Private Fines Levied In Civil Actions Which Combine The Reparative And Punitive Functions Would Have Been Subject To The Amercements Clauses*

By the middle of the 18th Century, English courts began to recognize power in a jury to impose "exemplary" or punitive damages in a tort action. The earliest situations were cases in which juries had returned excessively large verdicts against government officials that could not be explained by reference to actual damages.

The term "exemplary damages" was first used in the case of *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). In *Huckle*, the jury had awarded 300*l* in damages against a magistrate found to have falsely imprisoned the plaintiff. Although the court evaluated actual damages at no more than 20*l*, it refused to set aside the verdict. The court reasoned that the jury's award must have been based on the spectre of "a magistrate over all the King's subjects, exercising arbitrary power . . . ." *Id.*, at 207, 95 Eng. Rep., at 769. Thus, the court focused on the danger to the general public posed by a magistrate gone out of control and the corresponding need to control such behavior through the imposition of a large "exemplary" award.

In refusing to reduce the award, the court in *Huckle* assumed that it had very little, if any, authority to second guess the size of the jury's verdict, treating the jury's punitive award as no different in this regard from a verdict for actual damages and observing "that it is very dangerous for the Judges to intermeddle in damages for torts." *Id.*[15] This assumption was, given the status of the defendant

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[15] In the late 19th Century, it was observed that the reasoning of the early "exemplary" damage cases in England and the United States "amount[ed] to no more than a refusal to set aside" the large awards being returned by juries which could not be explained solely by reference to what "actual" damages had been sustained by the plaintiff. W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 302 (2d ed. 1912).

as a government agent, not inconsistent with the amercements clauses of Magna Carta because Magna Carta's limitations on the size of punitive awards were not believed to be applicable to amercements or punitive fines imposed on "those who have administration of justice . . . ." *Griesley's Case*, 8 Co. Rep. 38a, 40a, 77 Eng. Rep. 530, 534 (C.P. 1588). Punitive awards against government officials had not, however, lost their character as amercements; they continued "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes* v. *Wood*, Lofft. 1, 19, 98 Eng. Rep. 489, 498-99 (C.P. 1763).

"Exemplary" damages were employed thereafter to deter individuals from seeking personal revenge for a wrong done to them by other private persons. *See Merest* v. *Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814); *Grey* v. *Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764).[16] Initially, the reasoning offered by the English courts to justify their allowance of "exemplary" or punitive damages payable to plaintiffs who had been wronged by other private persons was confused. Sometimes this practice was explained in terms of compensation for "intangible wrongs." *See, e.g., Tullidge* v. *Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769) (public nature of tort occasioned greater actual damages). Such non-punitive rationales gradually faded in the 19th Century as English courts expanded the content of "actual" damages to comprehend "intangible" harm such as emotional distress. *See, e.g., Andrews* v. *Askey*, 8 Car. & P. 7, 173 Eng. Rep. 376 (C.P. 1837).

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[16] These cases reflect the thinking which led originally to the demise of "bloodfeud" under which Anglo-Saxons were entitled to take personal revenge on someone who had wronged them. "Bloodfeud" had given way to the system of compensation coupled with the payment of "wites" discussed in part I.B.4. above. *See* W. McKechnie, note 12 *supra*, at 284-85.

The result of this evolution in modern English tort law was that the "compensatory" rationales for punitive damages were no longer available to justify such excessive awards. This in turn led to the courts' recognition that the only remaining justifications for such damages in excess of actual harm suffered by the plaintiff were punishment and deterrence—the precise rationale under which amercements had been justified. Thus, the English courts appear in the 18th and 19th Centuries simply to have adopted the model from medieval times under which the reparative and punitive functions of the law had been joined in civil actions subject to the amercements clauses, and applied that model to private tort actions. The only difference between these ancient and modern civil actions was that the punitive damages became, with virtually no explanation, payable to the plaintiff rather than the Crown.

The same ambiguity is present in "punitive damages" cases in the United States in the early 19th Century, with many cases rationalizing punitive or exemplary damages as being simultaneously compensatory and punitive. *See, e.g.*, *McNamara* v. *King*, 7 Ill. (2 Gilm.) 432, 436 (1845). As in England, the gradual expansion of the concept of actual damages to include compensation for intangible injuries such as mental anguish left "nothing for 'exemplary damages,' as formerly understood, to operate upon . . . ." *Fay* v. *Parker*, 53 N.H. 342, 384 (1872). Thus, "exemplary" damages came to be understood "to refer to criminal punishment for the sake of public example . . . ," *id.*, or as "punishment, and to preserve the public tranquility." *Hawk* v. *Ridgway*, 33 Ill. 473, 475 (1864).

Since the middle of the 19th Century, the purely "punitive" purposes of punitive damage awards in the United States have been generally recognized. As demonstrated above, however, the theoretical basis for these awards remained, and continues to remain, unchanged from the early 13th Century when such awards were subjected to control by the amercements clauses of Magna Carta. The doctrine

was, in the late 19th Century, "well characterized as 'a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine.' " W. Hale, note 15 *supra*, at 303. Also as demonstrated above, there is no principled distinction to be drawn between contemporary punitive damage awards and the punitive component of awards rendered in common law actions to which the amercements clauses were applied.

When the Framers of the Eighth Amendment incorporated the proportionality principles of the amercements clauses of Magna Carta into the Eighth Amendment, they necessarily preserved for persons in the United States at least the protection from excessive punitive fines as had been enjoyed under those clauses for almost six centuries as summed up in the English Bill of Rights of 1689.

C. The $1,600,000 Punitive Damage Award In This Case Is Constitutionally Excessive

The distinctive feature of a punitive damage award which makes it functionally and legally indistinguishable from an amercement or a fine also serves to frame the inquiry whether such an award is excessive under the Excessive Fines Clause. As discussed in part I.A. above, the purpose of the punitive damage award in this case is to inflict punishment for a wrong to society and to deter similar conduct. Thus, the punitive damage award bears no relation to the damage inflicted on appellee. Rather, it purportedly serves to vindicate the alleged wrong to the public in much the same way as would monetary penalties imposed under a criminal statute. This Court's decision in *Solem* v. *Helm*, although it involved an issue of proportionality under the Cruel and Unusual Punishments Clause, provides an appropriate starting point for the determination whether the $1,600,000 punitive damage award in this case is constitutionally excessive.

1. *The Inquiry Into Disproportionality Under* Solem *v.* Helm

In *Solem*, the Court considered whether a sentence of life imprisonment imposed on a recidivist convicted of uttering a $100 check on a non-existent account was constitutionally excessive. 463 U.S., at 281-84. The Court looked to three factors:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id., at 292.

There is an initial difficulty in attempting to apply these three factors to the punitive fine in this case because the fine was imposed on a completely *ad hoc* basis by a jury that performed several functions which would customarily be performed by a legislature. For example, if the legislature of Mississippi, rather than the Supreme Court of Mississippi, had determined that conduct of the type involved in this case was worthy of criminal punishment, the legislature presumably would have made that determination in a statute which would have given notice with reasonable specificity of the conduct prohibited and would simultaneously have prescribed a range of punishment sufficient, in the legislature's view, to punish the conduct and to deter others from engaging in similar conduct.

Although the Mississippi legislature has enacted legislation punishing certain types of conduct occurring in the course of conducting the business of insurance, *see* note 3 *supra*, it has not passed legislation expressly punishing, either criminally or civilly, conduct constituting bad faith failure to pay an insurance claim as such. Thus, it is uncertain just how "grave" this offense is in Mississippi, although one reasonable inference to be drawn is that the legislature of Mississippi does not regard bad faith failure

to pay an insurance claim as a sufficiently serious or widespread problem to warrant legislative intervention. By the same token, because no limit has been established by either Mississippi's legislature or its courts on the size of punitive damage awards which may be imposed by Mississippi juries in bad faith cases, it is difficult to determine in such a vacuum the relative harshness of the $1,600,000 punitive award. It was imposed under a system in which each jury is free to impose a punitive award in virtually any amount for virtually any reason. By any common-sense standard, however, a punitive fine of $1,600,000 for refusal to pay a $20,000 claim based upon the professional judgment of an expert later determined by a jury to have been incorrect appears, on its face, to be draconian.

Because punishment for violating Mississippi's bad faith "law" is open-ended in terms of severity, the second line of inquiry established by *Solem* is more illuminating. The legislature of Mississippi has in fact made criminal certain types of conduct occurring in the insurance industry. For example, had appellant, instead of denying appellee's disputed claim on the basis of expert medical opinion, made a misrepresentation to appellee "for the purpose of inducing" him to "surrender his insurance," *Miss. Code Ann.* § 83-5-35(a)(1972), or made an "untrue, deceptive, or misleading" statement "with respect to the business of insurance," § 83-5-35(b) (1972), appellant could have been convicted, after a criminal trial, of a misdemeanor and subjected to a maximum fine of $1,000 under § 85-5-85. Because such misconduct under either § 83-5-35(a) or (b) could have, in theory, led to unjust denial of appellee's insurance claim in this case, appellant's "offense" in this case is presumptively no more "grave" than the conduct prescribed by § 83-5-35(a) or (b). The harshness and disproportionality of the punishment, however, is quite clear: appellant's fine is 1,600 times larger than the maximum monetary criminal fine deemed appropriate by the legis-

lature of Mississippi to punish and deter insurance companies engaged in similar conduct.

The third criteria suggested in *Solem*—punishments imposed for the same offense in other jurisdictions—is complicated in its application by the need to determine whether to be guided by the judgments reached by state legislatures in statutes or the verdicts of juries which are administering an *ad hoc* system of inflicting unrestrained monetary punishment on insurance companies alleged to have acted in bad faith. Mississippi's sister state of Alabama is a prime example. The Alabama legislature has provided that an insurance company should be required to pay 1-1/2% per month of an outstanding insurance claim "until it is finally settled or adjudicated" if the claim is ultimately determined to have been wrongfully denied. *Ala. Code* § 27-1-17(b) (1986). On the other hand, an Alabama jury decided that the Aetna Life Insurance Company should be punished in the sum of $3,500,000 for bad faith failure to pay a $1,650 insurance claim, a punishment eventually reduced to $500,000 by the Supreme Court of Alabama. *See Aetna Life Insurance Co.* v. *Lavoie*, 505 So.2d 1050 (Ala. 1987). If Aetna in that case had been penalized under § 27-1-17, its punishment would have been less than $5,000. Other similar conflicts between legislative judgments and the decisions of individual juries abound.[17]

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[17] For example, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277 (1964), the Court observed that the $500,000 punitive damage award against the *Times* was "one thousand times greater than the maximum fine provided by the Alabama [criminal libel] statute" for the same essential conduct. More recent examples are commonplace. An intermediate appellate court in California recently affirmed a $5,000,000 punitive damage award against an insurance company in a "bad faith" case, *Downey Savings and Loan Ass'n* v. *The Ohio Cas. Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (Ct. App. 2d Dist.), *pet. for rev. denied*, No. S 000553 (Cal. May 27, 1987), even though the California legislature has provided a maximum fine of $500 for knowing failure by an insurance company to "effectuate prompt, fair, and equitable

Appellant submits that the appropriate, *objective* measure of the excessiveness of a punitive damage award imposed by a civil jury should be the relationship of a punitive damage award to the monetary punishment exacted by the legislature of that jurisdiction (and, as necessary, other jurisdictions) for the same or similar conduct.[18] Because jurors in punitive damage cases operate without meaningful guidance or bounds established either legislatively or judicially, their individual determinations imposing punitive damage awards represent precisely the type of "subjective judgments" which this Court has "eschewed," *McCleskey* v. *Kemp*, No. 84-6811 (Apr. 22, 1987), slip op., at 17, 107 S. Ct. 1756, 1771 (1987), in trying to "ascertain objective indicia that reflect the public attitude toward a given sanction . . . ." *Id.*, at 17, *quoting Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976). As the Court went on to state in *McCleskey*:

> First among these indicia are the decisions of state legislatures, "because the . . . legislative judgment weighs heavily in ascertaining [contemporary] standards" . . . .

Slip op., at 17, *quoting Gregg* v. *Georgia*, 428 U.S., at 175.[19] Determining the disproportionality of punitive dam-

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settlements of claims." *See Cal. Ins. Code* § 790.03(h)(5) (West. Supp. 1987). The Arizona Supreme Court recently reinstated a $3,500,000 punitive damage award in a "bad faith" case, *Hawkins* v. *Allstate Ins. Co.*, 733 P.2d 1073 (Ariz. 1987), notwithstanding that the Arizona legislature has provided a maximum monetary punishment of $5,000 for conviction of a felony involving a deceptive business practice. *See Ariz. Rev. Stat.* § 13-2202(1978).

[18] In its brief filed in the court below on direct appeal, appellant pointed out that the $1,600,000 punitive damage award was grossly out of line as compared with statutory penalties for breach of insurance contracts which had been enacted in Georgia, Arkansas and Tennessee. J.S. App. 131a-132a. Because Mississippi's legislature has not adopted any legislation penalizing the precise type of conduct for which punitive damages were sought in this case, resort to that legislature's judgments regarding similar conduct is appropriate.

[19] In cases such as *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court

age awards based upon their relationship to comparable legislative judgments would ensure an objective, rather than subjective, consideration of this question. In addition, assessing proportionality in this manner would be faithful to the process by which the excessiveness of punitive awards was determined under Magna Carta.

2. *The Inquiry Into Excessiveness Under Magna Carta*

As this Court observed in *Solem* v. *Helm*, the amercements clauses of Magna Carta "were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." 463 U.S., at 285.[20] As discussed in part I.B.4. above, the purpose of Magna Carta was to reduce the arbitrariness and excessiveness of

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has also looked to the punishments imposed by criminal juries as evidence that particular punishments do or do not reflect contemporary social values. However, criminal juries, in stark contrast to civil juries called upon to impose punitive damages, operate within a framework of restraints on the amount of punishment they may inflict based upon prior legislative judgments. In such cases, jury discretion has, by statute, been "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*, at 189.

[20] Mississippi's system of permitting jurors to impose punitive damage awards in unlimited amounts based upon the wealth of the defendant and their *ad hoc* judgment as to how large a punishment would be required to punish and deter that defendant and others, is fundamentally offensive to Magna Carta, the Excessive Fines Clause, and concepts of due process embodied in the Due Process Clause of the Fourteenth Amendment. If, for example, a criminal statute provided that persons with annual incomes above $100,000 were subject, for the same offense, to greater potential prison sentences or criminal fines than persons with less annual income, that statute would raise grave constitutional questions under decisions such as *Robinson* v. *California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional). It is one thing to provide that in imposing punishment a judge may consider the wealth of a defendant in finally arriving at an appropriate punishment within a range of punishments previously established by the legislature to which all persons, regardless of wealth, are subject. It is quite another matter, however, to establish a two-tiered system of different maximum punishments for the same offense based solely upon the wealth, or any other similar status in society, of the defendant.

amercements which had become, in John's reign, tools of "extortion." The process by which amercements were finally assessed had much to do with eliminating the arbitrariness of amercements.

Chapter 20 required that an amercement be "in accordance with the degree of the offence." Consistent with this requirement, limits on amercements for particular offenses had frequently been established even before 1215 by local rules or customs which were the equivalents of statutes. *See* J. Holt, *Magna Carta* 50, 230-32 (1965). In medieval England, a two-step process developed under which judges would, in the absence of a fixed amercement for a particular offense, establish the maximum amercement, it being their "duty to see that the amount was proportionate to the gravity of the offence." W. McKechnie, note 12 *supra*, at 288 (footnote omitted). Under this process, amercements were "usually uniformly assessed," J. Holt, *supra*, at 231 n.2, but if an amercement seemed excessive (and often when it did not), a second step in the process put the issue, as required by the last clause of Chapter 20 of Magna Carta, to a "jury" of peers of the person to be amerced.

The function of these peers was not, as was true of the jury in this case, to set the maximum possible punishment and then to impose it based upon their view of the underlying cause and their unbridled emotions at the close of argument. Rather, the function of these peers under Magna Carta in this second step was to *reduce* the amercement set by the judges or other authority "in accordance with their knowledge of the wrong-doer's ability to pay." W. McKechnie, note 12 *supra*, at 288. Thus, Magna Carta did not permit English juries to impose amercements based on the wealth of the person to be amerced; indeed, Magna Carta was believed to outlaw any amercement greater than the actual damages suffered by the plaintiff.[21] Instead, it

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[21] According to Fitz-Herbert, the requirement of Magna Carta that

maintained and strengthened a rational system under which a relatively uniform schedule of amercements emerged; within that system, a jury of peers could provide some relief based in part on the *lack of wealth* of the person amerced.

Aberrant cases arose after Magna Carta, and Chapter 20 was enforced. In *Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934), a writ was brought by Le Gras challenging a one-mark amercement by the Bailiff in connection with Le Gras's role as plaintiff in a suit. Le Gras apparently complained that the amercement was procedurally defective because it had been assessed by the Bailiff rather than his peers as required by Magna Carta, and that it was excessive as being disproportionate to his offense. The decision was that the Bailiff was ordered to "take a moderate amercement proper to the magnitude and manner of the offence, according to the tenour of the Great Charter of Liberties . . . ." 52 Selden Society, at 5 (footnote omitted).

A 17th Century case provides further support for the proposition that the amercements clauses of Magna Carta were interpreted to require that fines bear a close relationship to punishments for similar offenses which were by that time largely determined by acts of Parliament. In that case, the Earl of Devon had been fined 30,000*l* before the King's Bench. He appealed to the House of Lords, arguing, *inter alia*, that the fine was excessive, *Earl of Devon's Case*, 11 State Tr. 1354, 1357 (1689), contending. that the fine was disproportionate to fines established by statute for similar offenses: "wherever the law has set down a fine, either by way of punishment or caution, it seldom exceeds 2,000*l*." *Id.*, at 1364. The House of Lords

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an amercement be moderate meant "that if it exceed the Value of the Trespass, it is not a moderate amercement . . . ." A. Fitz-Herbert, *Natura Brevium* 168 (6th ed. 1718).

concluded, three months after the English Bill of Rights of 1689 was enacted, that

> the fine of 30,000*l* . . . was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.

Id., at 1370. This 17th Century invocation of the amercements clauses in connection with the imposition of an excessive fine confirms the vitality of those clauses after the English Bill of Rights of 1689, demonstrates that those clauses applied to "fines" as a form of 17th Century punishment, and illustrates how the English by then inquired into excessiveness—by reference to the more recent development of statutes as the primary means of setting criminal punishments.[22]

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[22] Measuring excessiveness by comparing punitive damage awards to the punishments established for similar conduct by state legislatures would also advance the purpose of Chapter 20's proviso that in no event may an award destroy a defendant's ability to continue to function within society. Under Chapter 20, an amercement otherwise proportional to the offense could not be imposed on a merchant unless it "sav[ed] his 'merchandise.' " In the 17th Century, Coke explained the rationale for this provision:

> For trade and traffique is the livelihood of a merchant, and the life of the commonwealth, wherein the king and every subject hath interest, for the merchant is the good bayliffe of the realme to export and vent the native commodities of the realme, and to import and bring in the necessary commodities for the defence and benefit of the realme.

E. Coke, *The Second Part of the Institutes of the Laws of England* 27-28 (5th ed. 1797). This Court has applied the principle that a fine must be proportionate to the offense and the principle of "salvo contenemento." In *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947), a majority of the Court, "consider[ing] the amount of defendant's financial resources and the consequent seriousness of the burden [of a $3,500,000 fine for criminal contempt] to that particular defendant," held that fine to be "excessive as punishment for the criminal contempt theretofore committed." *Id.*, at 305. The fine was remitted conditionally to $700,000 for an offense held by the Court to

II

THE IMPOSITION OF PUNITIVE DAMAGES ON THE BASIS OF A NEWLY ANNOUNCED STANDARD OF LIABILITY IMPOSED RETROSPECTIVELY TO THIS CASE VIOLATES THE CONTRACT CLAUSE AND THE DUE PROCESS CLAUSE OF THE CONSTITUTION

Prior to the decision in this case by the court below, the substantive rules under which punitive damages could be imposed in Mississippi were, even if somewhat opaque, reasonably settled in that punitive damages were available only when a breach of contract was "attended by some intentional wrong, insult, abuse, or gross negligence . . . ." *See Pilot Life Insurance Co.* v. *Dedeaux*, slip op., at 7, 107 S. Ct. at 1554, *quoting American Railway Express Co.* v. *Bailey*, 142 Miss., at 631, 107 So., at 763. This rule had been reiterated by the court below in *Standard Life Ins. Co. of Indiana* v. *Veal*, 354 So.2d 239 (Miss. 1977), two years before the operative facts in this case occurred. In addition, it was also clear in Mississippi as recently as 1984 that an insurance company could not be held liable for punitive damages in a bad faith case if it had an "arguable reason" for denying a claim. *Blue Cross & Blue Shield of Mississippi Inc.* v. *Campbell*, 466 So.2d, at 842.

In its decision in this case, the court below changed the rules, holding for the first time that punitive damages are available in Mississippi, regardless of wrongful motive, if the insurer *lacked* a legally sufficient "arguable basis" for rejecting a claim. The court below also changed the rules in another material respect. The court held that an insurer not only must have an arguable basis for denying a claim, but it must assert that precise basis in denying a claim in order to rely on that basis as a defense against a claim

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have presented "a serious threat to orderly constitutional government, and to the economic and social welfare of the nation." *Id.*

for punitive damages. J.S. App. 30a-32a, 36a, 483 So.2d, at 269, 271.

Whether addressed as a violation of the Due Process Clause of the Fourteenth Amendment or the Contract Clause,[23] Mississippi's recognition in this case of a materially relaxed standard for the imposition of punitive damages and the application in this case of that new standard to uphold the punitive award cannot be sustained in light of the extremely limited interest of Mississippi in providing to appellee a windfall totally unrelated to any damages suffered by appellee.

As this Court has recently reiterated:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Roberts v. *United States Jaycees*, 468 U.S. 609, 629 (1984), *quoting Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The *Roberts* Court went on to explain the

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[23] In *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986), appellant Aetna Life Insurance Company ("Aetna") argued to the Court that the recognition by the Supreme Court of Alabama of a right of action for bad faith refusal to pay an insurance claim could not, consistent with the Contract Clause, be applied retrospectively to impose a new and material obligation on an insurance contract entered into and performed prior to that recognition. Aetna specifically argued, Br. of Appellant, at 30-35, that the word "law" as it appears in the Contract Clause comprehends judge-made common law. Although *dictum* in this Court's decision in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), would support the argument that the Contract Clause applies only to legislative—as opposed to judicial—lawmaking, this Court's recognition that Aetna's Contract Clause argument raised an "important issue," slip op., at 14, 106 S. Ct., at 1589, necessarily rejected the argument that that *dictum* in *Tidal Oil* is viewed by the Court as foreclosing appellant's reliance in this case on the Contract Clause.

underlying rationale for this first principle of due process in language which applies directly to the case at bar:

> The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws [and] enables individuals to conform their conduct to the requirements of law . . . .

Id. Where, as here, an essentially criminal penalty has been imposed, this Court's cases make clear that "the standard of certainty is higher." *Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8 (1983). And as discussed above, the standards under which appellant's penalty was assessed were basically non-existent when appellant's conduct occured.

In *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court struck down under the Due Process Clause a Pennsylvania statute under which a jury, having acquitted a criminal defendant, was authorized to award court costs against the defendant. The Court condemned the statute as "leav[ing] to the jury such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be . . . ." *Id.*, at 403. Mississippi's law of bad faith is vastly worse because such decisions of juries may be accompanied by enormous penalties.

In a very real sense, appellant has been "convicted" for violating a "law" which literally did not exist in Mississippi until the decision of the court below was handed down. Having had no fair warning that its conduct was "illegal," appellant has been punished in the sum of $1,600,000 for its reliance on its expert medical director to deny appellee's debatable claim. There can be no doubt that under

standards laid down by the Court, this punishment is "harsh and oppressive." *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981). There is also no doubt that this punishment is focused exclusively on the "blameworthiness" of appellant and the purpose of achieving "deterrence" of similar conduct, the two objectives identified by the Court as least likely to sustain the retrospective imposition of *civil* liability. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976). The *Turner Elkhorn* rule is undoubtedly of greater force in the context of liability imposed exclusively for the purposes of punishment and deterrence.

Furthermore, a clear majority of the Court has

> recognize[d] that "the alleged deterrence achieved by the punitive damages awards is likely to be outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined."

Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.), *quoting Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.). Where, as here, the standards are not only "ill defined" but were in fact non-existent at the time the contract at issue was entered and performed, Mississippi has "no substantial interest in securing for [appellee] gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 349.

III

MISSISSIPPI'S APPEAL PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

Unless the Court vacates the judgment below on the basis of appellant's challenges to the punitive damage award,[24] the Court must decide whether Mississippi's appeal penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1986), pursuant to which a punitive fine of over $240,000 was imposed on appellant for having unsuccessfully appealed the judgment of the trial court, is constitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. As appellant will demonstrate, § 11-3-23 constitutes nothing more than an "automatic assessment of unproved damages" and therefore is plainly unconstitutional under the Court's decision in *Lindsey* v. *Normet*, 405 U.S. 56, 78 (1972).

A. Section 11-3-23 Places A Constitutionally Impermissible Burden On Appellant's Exercise Of Its State-Law Right To Appeal

Mississippi is one of four States which, by statute, impose a mandatory appeal penalty on litigants who unsuccessfully appeal from a money judgment. Under § 11-3-23, a fifteen percent penalty is imposed on the unsuccessful appellant solely because the judgment is affirmed.[25] Thus, even if, as in this case, a money judgment is affirmed by

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[24] If the Court vacates the judgment below based upon appellant's challenge to the punitive damage award, the Court's order would have the legal effect of vacating in its entirety the order of the court below, J.S. App. 102a, by which the fifteen percent appeal penalty was assessed, because that penalty is dependent on the existence of a trial court judgment which has been affirmed by the court below. If appellant prevails on any of its arguments respecting the punitive damage award, the constitutionality of § 11-3-23 will not be before the Court.

[25] Although many States have in place, by statute or rule, mechanisms

a narrow 5-4 majority of the court below in a case in which the appellant is unsuccessful only because the court creates new law, the assessment—which is "in the nature of a penalty," *Meek* v. *Alexander*, 137 Miss. 117, 121, 102 So. 69, 70 (1924)—is automatically made.

The court below has stated that § 11-3-23 "expresses the state's interest in discouraging frivolous appeals." *Walters* v. *Inexco Oil Co.*, 440 So.2d 268, 274 (Miss. 1983). It has also been stated that a purpose of the statute is to "provid[e] a measure of compensation for the successful appellee." *Id.* In this case, most of the award is simply a penalty on a penalty and is not compensatory in any sense.

Under § 11-3-23, appellant was exposed to this appeal penalty because it incurred a money judgment against it in the trial court. If instead appellant had prevailed in the trial court, appellee could have taken an entirely frivolous appeal to the court below without incurring any risk that an appeal penalty of any kind would be imposed.[26] Section

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designed to deter frivolous appeals, the Court observed just this Term that only three States, in addition to Mississippi, impose a non-discretionary, mandatory penalty following the affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal. *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (Feb. 24, 1987) slip. op., at 2 n.1, 107 S. Ct. 967, 969 n.1 (1987). These three other States are Alabama, *Ala. Code* § 12-22-72 (1986); Kentucky, *Ky. Rev. Stat.* § 26A.300 (1985); and Virginia, *Va. Code* § 16.1-113 (Supp. 1986).

[26] Mississippi has no statutes or rules under which a party taking a completely frivolous appeal is subjected to monetary sanctions based upon the frivolousness of its appeal.

In Mississippi, if a victorious plaintiff is dissatisfied with the size of a money judgment and files what proves to be an unsuccessful appeal prior to the filing of an appeal by the defendant, the judgment awarded against the defendant will be reduced by fifteen percent. *See Pearce* v. *Ford Motor Co.*, 235 So.2d 281, 283 (Miss. 1970). However, as *Pearce* makes clear only the initial appellant bears any risk of incurring an appeal penalty because the other party may file a cross-appeal without having imposed on it an appeal penalty even if the judgment on its

11-3-23, the arbitrary penalty it imposes, and the irrational classifications it creates, are plainly unconstitutional.

1. *The Appropriate Standard Of Review*

In *Lindsey* v. *Normet*, the Court established the parameters under which a statute affecting the exercise of a state-law right to appeal would be reviewed when challenged as violative of the Fourteenth Amendment. In *Lindsey*, the Court struck down an Oregon statute which required a tenant appealing from an adverse decision to comply not only with general rules applicable to appeals but, in addition, to post a double bond covering twice the rental value of the property. Then, if the decision were affirmed on appeal, the appellee landlord was "automatically entitled to twice the rents accruing during the appeal without proof of actual damage in that amount." 405 U.S., at 76.

In striking down the Oregon scheme which, like § 11-3-23, provided nothing but a windfall to appellees unrelated to any costs incurred by them in defending their judgments on appeal, the Court did not question that a State could enact "reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends *and* if they are uniformly and nondiscriminatorily applied." *Id.*, at 78 (emphasis added). But, § 11-3-23 is neither "reasonably tailored" to the stated ends it seeks to achieve, nor is it applied in a uniform, nondiscriminatory fashion.

2. *The Appeal Penalty Is Not Reasonably Tailored To Achieve Any Legitimate State Purpose*

The legitimate state interest in curbing frivolous appeals cannot be advanced as a defense of § 11-3-23. Indeed,

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appeal is affirmed. Thus, in this case only Bankers Life bore the risk of being penalized for exercising its right to appeal from the outset of this litigation until its conclusion in the court below.

because § 11-3-23 does not even permit the court below to determine whether an appeal is frivolous, this asserted justification for the burden imposed by § 11-3-23 on appellants is in fact no justification at all. In any event, even if curbing frivolous appeals is accepted as a purpose of § 11-3-23, it is not "reasonably tailored" to advance that purpose. It is grossly overinclusive because it sweeps within it substantial appeals. It is simultaneously underinclusive in that Mississippi does *nothing* to penalize the taking of frivolous appeals by plaintiffs who fail to secure money judgments at the trial level or who cross-appeal in an attempt to secure an even larger judgment. Thus, § 11-3-23 bears no rational relationship to the salutary objective of curbing frivolous appeals.

There is likewise no rational relationship between penalties assessed under § 11-3-23 and the purpose of providing "compensation" to a prevailing appellee. First, the penalty bears no relationship to the costs, including attorneys' fees, which the appellee may have incurred in defending the appeal. This Court necessarily held as much in *Burlington Northern R. Co.* v. *Woods*, where it determined that Alabama's mandatory appeal penalty statute was in conflict with Rule 38, Fed. R. Civ. P. The Court contrasted Rule 38 with § 11-3-23, declaring the latter to be in conflict with Rule 38 because it had "the effect of . . . penalizing every unsuccessful appeal regardless of merit." Slip op., at 5, 107 S. Ct., at 970. Unlike an award pursuant to Rule 38, which may legitimately be viewed as compensation, an award under § 11-3-23 is simply a windfall to the appellee of the kind found impermissible in *Lindsey* v. *Normet*.

Second, where the penalty is assessed upon a punitive damage award which itself bears no relationship to the actual damages suffered by the appellee in connection with the underlying action, the penalty cannot be said to act as compensation for any *losses* suffered by the appellee based upon the underlying conduct of the appellant which

resulted in the money judgment.[27] There is no state interest in this arbitrary penalty mechanism sufficient to overcome the Court's admonition that limitations on a state-created right of appeal must be "reasonably tailored" to achieve legitimate purposes.

B. The Appeal Penalty Operates In An Impermissibly Discriminatory Fashion

Even if § 11-3-23 were determined to be "reasonably tailored" to achieve the purposes of that statute as articulated by the court below, it is manifest that it treats litigants differently and that the differing treatment cannot be justified given the importance the Court assigned in *Lindsey* v. *Normet* to the proposition that litigants should have equal access to a state's appellate system. Under *Lindsey*, Mississippi may not at any stage of litigation discriminate in favor of any class of litigants by permitting that class to take completely frivolous appeals without fear of punishment while it punishes another class with a substantial, mandatory penalty for taking a substantial appeal. When the states place a financial burden on the taking of an appeal, they must "impose this financial burden upon all . . . whose appeals have been unsuccessful." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966). As held by this Court in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150, 153 (1897), litigants must "enter the courts upon equal terms." Appellant and appellee did not, by virtue of § 11-3-23, do so and, therefore, § 11-3-23 must fall.

CONCLUSION

"Punitive damages" is a misleading label. They are not restitution for injury caused to the plaintiff and should not

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[27] The interests of a judgment creditor in Mississippi in the judgment itself are protected by *Miss. Code Ann.* § 75-17-7 (Supp. 1986), which provides for post-judgment interest from the date of entry of the judgment until the judgment is paid.

be considered analytically as "damages." They are penalties which juries are permitted to impose in order to punish and deter. The fact that these penalties are paid to private litigants is immaterial in evaluating the constitutional implications of these penal fines.

A pervasive theme of the Constitution is the promise of protection from capricious and extreme governmentally imposed penalties. The power of government is at its most intimidating and potentially devastating when it exercises its authority to punish. The Excessive Fines, Due Process and Equal Protection Clauses all serve to place limits on the exercise of punitive governmental authority. Multi-million dollar, government sanctioned, jury imposed, discretionary fines, whether labelled civil or criminal, cannot withstand scrutiny under these fundamental protections.

May 29, 1987

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL

COPELAND, COOK, TAYLOR & BUSH
Post Office Box 2132
Jackson, Mississippi 39225-2532
(601) 354-0123

*THEODORE B. OLSON
LARRY L. SIMMS
TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500
Attorneys for Appellant

**Counsel of Record*

APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

2. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

3. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

4. The Contract Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

5. Section 11-3-23 of the Mississippi Code Annotated (Supp. 1986) provides, in pertinent part, that:

> "In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment be for a sum of money, the damages shall be upon such sum . . . ."

(12)

Supreme Court, U.S.
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No. 85-1765

In The Supreme Court of the United States

October Term, 1986

BANKERS LIFE AND CASUALTY COMPANY

APPELLANT

VERSUS

LLOYD M. CRENSHAW

APPELLEE

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

BRIEF OF AMICI CURIAE IN SUPPORT OF LLOYD M. CRENSHAW

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL

ROBERT L. GIBBS
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR APPELLANT

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE (601) 359-3680

12 pgs

QUESTIONS PRESENTED

Whether § 11-3-23, Mississippi's mandatory penalty statute for unsuccessful appeals, is reasonably tailored to Mississippi's legitimate purposes of discouraging frivolous appeals, providing compensation for the unsuccessful appellee and to protect the Mississippi Supreme Court from spending its time, energy and resources on appeals thoughtlessly taken.

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INTEREST OF AMICUS CURIAE

Appellant herein, challenges the constitutionality of § 11-3-23, Mississippi Code of 1972, as amended. This statute mandates that a 15% penalty be assessed against parties who unsuccessfully appeal a money judgment or decree. Because the purpose of this statute is 1) to discourage frivolous appeals, 2) to assure that cases brought to the Supreme Court are those in which bona fide, substantial claims of legal error are found, and 3) to provide a measure of compensation for the successful appellee, Amicus, believes it is important that the State of Mississippi expresses its views on the constitutionality of this statute.

MISSISSIPPI'S MANDATORY PENALTY STATUTE IS REASONABLY TAILORED TO LEGITIMATE STATE PURPOSES AND THEREFORE PASSES CONSTITUTIONAL MUSTER

It is well settled that procedural provisions to discourage patently insubstantial appeals are valid, if reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied. Lindsey v. Normet, 405 U.S. 56, 78, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972). Section 11-3-23, Mississippi Code of 1972, as amended, falls well within these guidelines.

Mississippi's penalty statute has been a part of Mississippi law since 1857.[1] Originally the statute called for a penalty in the amount of five percent (5%) of the underlying judgment or decree, but in 1980 the Mississippi legislature increased the penalty to fifteen percent (15%). The

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[1] Miss. Rev. Code, Ch. 63 Art 12 (1857).

penalty is mandatorily imposed on the unsuccessful appellant if the Mississippi Supreme Court unconditionally affirms a final judgment or decree which is of the type specified by the statute. The judgment or decree specified are (1) a sum of money, (2) possession of real or personal property, (3) dissolution of an injunction or other restraining process involving real or personal property, (4) the sale of property or some interest in it to satisfy a sum out of the proceeds of the sale, and (5) enforcement or establishment of a lien, charge or claim upon property or some interest in property. Wallace v. Jones, 360 So. 2d 932, 933 (Miss. 1978).

The penalty statute has no legislative history. But, because the Mississippi Supreme Court has been called on to examine the application and constitutionality of the

statute on numerous occasions, the purpose for the statute is easily ascertainable. In Walters v. Texaco Oil Co., 440 So.2d 268 (Miss. 1983), the Mississippi Supreme Court was called upon by the United States Court of Appeals for the Fifth Circuit to decide if § 11-3-23 should be enforced in the federal courts under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938). In order to answer this question, the Court was required to explore the purpose for the statute. A threefold purpose was determined.

First, the statute expresses the state's interest in discouraging frivolous appeals. Second, it expresses an interest in providing a measure of compensation for the successful appellee. Id. 274. And, third, the statute protects the Mississippi Supreme Court from being required to spend its time, energy and

resources on appeals thoughtlessly taken. Id. p. 275.

Unlike the double-bond requirement in Lindsey, the penalty statute does not bar a party from appealing. Every losing party has an automatic right of appeal. However, the penalty statute does force the appealing party to consider the merits of his case, prior to appealing it. As the Mississippi Supreme Court said in Walters:

> When deciding whether to exercise that right [to appeal], the penalty statute is there for him to consider. If he is successful on his appeal, of course, he incurs no penalty. If he loses, however, he must pay the price, a price he well knows and may easily calculate before giving his notice of appeal. p. 275.

Burlington Northern R. Co. v. Woods, 480 U.S. ___, 108 S.Ct. ___, 94 L.Ed.2d 1 (1987),

cited by appellant does not hold differently. This Court in Burlington expressly declined to reach the Fourteenth Amendment issue. This Court found that Alabama's penalty statute could not be applied in diversity cases becausethe discretionary mode of operation under F.R.Civ.P. 38, conflicts with the mandatory provisions of Alabama's penalty statute. There was no finding that the mandatory statute was unconstitutional. In fact, this Court seemed to agree that a statute which is tailored to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the judgment is permitted. These are two of the purposes of Mississippi's penalty statute. Further, this Court found that the purpose for Rule 38 and the Alabama penalty statute were

"sufficiently co-extensive." Clearly, if Rule 38 is constitutional and Alabama's and Mississippi's penalty statute are "sufficiently co-extensive" with Rule 38, they too must be constitutional.

The penalty statute is also uniformly and nondiscriminatorily applied in Mississippi. This is best explained by a unanimous Mississippi Supreme Court in Wallace v. Jones, 360 So.2d 932 (Miss. 1978). Justice Suggs writing for the Court said:

> The statute does not discriminate against a class of litigants because all unsuccessful appellants, whether plaintiff or defendant, are subjected to five percent [now fifteen percent] damages where the judgment or decree appealed from permits recovery. Consequently, the statute does not discriminate within the classes established by it and permits assessment of damages only when the judgment or decree appealed from permit recovery by one

of the parties in the trial court.

CONCLUSION

For the foregoing reasons, this Court, if it reaches the merits of § 11-3-23, should find that it is constitutional.

Respectfully submitted,
EDWIN LLOYD PITTMAN
ATTORNEY GENERAL

ROBERT L. GIBBS
ASSISTANT ATTORNEY GENERAL

BY: Robert L. Gibbs
ROBERT L. GIBBS

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF APPELLEE

ERNEST R. SCHROEDER
VINCENT J. CASTIGLIOLA, JR.
P.O. Drawer 1529
1108 Jackson Avenue
Pascagoula, Miss. 39567
(601) 762-6631

BRUCE J. ENNIS, JR.*
KIT ADELMAN-PIERSON
PAUL R. FRIEDMAN
ENNIS FRIEDMAN & BERSOFF
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100

Attorneys for Appellee

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 85-1765

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF APPELLEE

STATEMENT OF THE CASE

For several years, Appellee Lloyd Crenshaw paid premiums to Appellant Bankers Life and Casualty Company to purchase insurance coverage against accidental dismemberment. Appellee suffered an accidental injury to his right foot. Twelve days after that injury his foot had to be amputated. Appellee submitted a claim for the policy benefit of $20,000. Appellant repeatedly denied the claim. Appellee sued for his policy benefit and also for punitive damages for the tort of bad faith refusal to pay an insurance claim.

A jury awarded the $20,000 owed under the policy and also punitive damages of $1.6 million. That judgment was affirmed by the Mississippi Supreme Court, which concluded that Appellant's refusal to pay the claim was "an outrage, and should be condemned." Jurisdictional Statement Appendix ("J.S. App.") 47a; 483 So.2d at 276. Because the judgment was affirmed without modification, a penalty of $243,000 (15% of the judgment) was assessed against Appellant pursuant to Miss. Code Ann. Sec. 11-3-23 (Supp. 1986) (reprinted in the Appendix to this Brief).

In this Court, Appellant challenges the punitive damage award and, more briefly, the penalty. Appellant's arguments seriously mischaracterize the facts, the record, and the law. For example, Appellant repeatedly asserts that its refusal to pay Appellee's insurance claim for accidental injury benefits was "based upon the professional judgment" of its medical director that arteriosclerosis was the "sole" cause of Appellee's amputation, but the jurors nevertheless awarded punitive damages because they thought that opinion was "incorrect." Appellant's Brief ("App. Br.") 33.[1] This assertion ignores the jury instructions and the evidence.

Under instructions proposed by Appellant, the jury was instructed *not* to award punitive damages if Appellant relied on a reasonable, though incorrect, medical opinion.[2] The evidence plainly supports the jury's conclusion that Appellant's denial of coverage was not based on that opinion. An internal memo prepared subsequent to that opinion explicitly acknowledged that Appellant *did not know* "if an injury caused the loss," and *could*

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[1] *See also,* App. Br. 4, 6 & 42: ". . . Appellant has been punished in the sum of $1,600,000 for its reliance on its expert medical director to deny appellee's debatable claim."

[2] Record on Appeal to Mississippi Supreme Court ("R.") 1141, Joint Appendix ("J.A.") 21; R. 1142, J.A. 22.

not know until it obtained more information (which Appellant never bothered to obtain).[3]

The jury awarded punitive damages because Appellant knowingly misrepresented its contractual obligations to Appellee and denied coverage based on a policy provision it *knew* was legally invalid.

The Mississippi Supreme Court found that "Bankers Life denied [Appellee's] claim, and gave as a reason therefore an exclusion under the policy which its executive personnel knew was invalid under Mississippi law." J.S. App. 33a-34a; 483 So.2d at 270. The policy language excluded coverage unless bodily injury caused the loss "directly and independently of all other causes and effected solely through an accidental bodily injury." J.S. App. 34a; 483 So.2d at 271. Appellant *knew* that exclusion was void under "well-established" Mississippi law, which required that policies with that language be interpreted to cover losses if the accidental bodily injury "played any part in the loss." J.S. App. 34a; 483 So.2d at 271. Despite that knowledge, Appellant repeatedly told Appellee that he could not recover under the policy unless he proved that his loss was caused "solely" by accidental injury "directly and independently of all other causes." J.S. App. 12a-18a; 483 So.2d at 260-63.[4] "In

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[3] R. 539, J.A. 16. The memo was received in evidence. *See* R. 507, 530-531. The memo acknowledged that "[u]ntil we know more about the condition and how (and whether) the alleged accident contributed to cause the loss we cannot very well apply the Mississippi law regarding proximate cause." *Id.* Eight days later, without obtaining further information, Appellant denied Appellee's claim for the fourth time. R. 571, J.A. 17. This time, unlike the three previous denials, Appellant did not even mention its medical director's opinion.

[4] These statements about the policy's coverage were knowingly false. The internal memo quoted *supra*, note 3, acknowledged that under Mississippi law, "there may be recovery under this type policy" if "the loss is the result of the combination of disease and

their dealing with Crenshaw, Bankers Life personnel knew they were under a duty not to give an invalid reason for denying his claim. This duty was violated." J.S. App. 35a; 483 So.2d at 271.

The Mississippi Supreme Court also found that Appellant "clearly recognized" it was "skirting a bad faith cause of action, but still played the odds." J.S. App. 47a; 483 So.2d at 276. Appellant was willing to "play the odds" because it mistakenly believed that Mississippi was only "a penalty state." J.S. App. 19a; 483 So.2d at 263.[5] In penalty states, there is a set penalty that can be awarded for bad faith refusal to pay an insurance claim (typically 10-20% of the contract liability). Appellant mistakenly believed that even if Appellee brought a bad faith action and won, he could recover, at most, only a $3,000 penalty. Thus, Appellant made a business decision to risk the possibility of a $3,000 penalty in order to keep and invest $20,000 it knew it should have paid.[6] As the trial judge noted in denying Appellant's post-trial motions, the trial testimony made it "very obvious" that Appellant believed Mississippi was "a penalty state" with a "fixed" penalty that was too small to be of any concern to Appellant.[7] R. 1243-44.

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accident." R. 539, J.A. 16. It nevertheless recommended that Appellant "point out" to Appellee's attorney, *contrary to Mississippi law*, "that we must have some substantiation that an injury caused this loss 'directly and independently of all other causes.'" J.S. App. 16a-17a; 483 So.2d at 262. That is what Appellant did. R. 571, J.A. 17.

[5] An internal memo from Appellant's claims supervisor records his incorrect belief that "this is a penalty state." R. 566.

[6] Appellant's gross investment income in 1980 was nearly $100 million. R. 768 (lodged with Court on July 27, 1987).

[7] A contingency fee based upon a maximum recovery of $23,000 provides little incentive for an attorney to undertake a protracted legal battle with a large and determined opponent. And most individual claimants are unable or unwilling to pay lawyers to litigate

The Mississippi Supreme Court further found that Appellant knowingly violated its "duty under the law to properly investigate any claim." J.S. App. 37a; 483 So. 2d at 272. Appellant knew that three "reputable doctors were of the opinion that trauma *did* play a part in the eventual amputation," which would entitle Appellee to policy benefits. J.S. App. 36a; 483 So.2d at 272 (emphasis added). It knew that "because of the absence of an emergency room report," its medical director had concluded "there was either no trauma or the trauma

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small claims, *particularly* if they have been told, falsely, that they can recover only if they prove an accident was the *sole* cause of their loss, independent of all other causes. Appellant knew that Appellee's base salary was only $7,176 per year, R. 82, and knew that Appellee knew his own doctors thought his injury was not the sole cause of his amputation. As the court below noted, Appellant falsely told Appellee he could not win unless he established facts that would be "a manifest impossibility in his case." J.S. App. 39a; 483 So.2d at 273. Faced with those odds, not many poor claimants would hire a lawyer to pursue a claim with a maximum value of $20,000-$23,000.

In penalty states, there is a strong business incentive for insurers to deny valid claims. For example, if Appellant denied 100 legitimate claims for $20,000 each, it would save (and earn investment income on) $2,000,000. If 10% of the denied claimants sued and recovered both contract damages and a 15% penalty, that would cost Appellant $200,000 for the contract claims it should have paid anyway, and $30,000 in penalties, for a total of $230,000. But Appellant would retain and receive investment income on $1,770,000 it should have paid. Even if *50%* of the denied claimants obtained counsel, and recovered both contract damages and 15% penalties, Appellant would still keep $850,000 it should have paid. In economic terms, in a penalty state the potentially enormous gains of bad faith refusal to pay insurance claims are worth the rather modest risk. Appellant's internal forms ask whether claimants are from "penalty states." R. 534. Obviously, Appellant was overtly concerned, in processing *all* claims, with whether it risked only modest "penalty" damages, or more substantial punitive damages, if it refused to pay the claim. Accordingly, because Appellant mistakenly believed Mississippi was a "penalty state," it made a deliberate business decision to "play the odds."

was insignificant," and knew that its medical director "noted the absence of an emergency room report in all of his written memos." J.S. App. 20a, 36a; 483 So.2d at 264, 271. Yet Appellant "made no attempt to get a copy" of that report. J.S. App. 36a; 483 So.2d at 271. In fact, before denying the claim, Appellant obtained "none" of the information its own internal procedures required it to obtain, even though Appellee had authorized it to do so. J.S. App. 33a; 483 So.2d at 270. "There was no interview of Crenshaw, no interview of any of his doctors, and no request for medical records." *Id.* Appellant "grossly violated its own in-house procedure for investigating a claim," because "a full and complete investigation posed a very strong likelihood of dissipating any contention that Crenshaw's trauma had absolutely nothing to do with the loss of limb." J.S. App. 46a-47a; 483 So.2d at 276.

The need to punish and deter such calculated, bad faith denials of insurance coverage is precisely why Mississippi, like many states, has made punitive damages available in these cases. Given the evidence in this case, the jury was plainly justified in awarding substantial punitive damages.

SUMMARY OF ARGUMENT

Point I: Section 11-3-23 should be analyzed under the rational basis test because it does not involve a suspect class or impinge on a fundamental right and did not prevent Appellant from exercising its right to appeal. The statute rationally furthers Mississippi's legitimate interests in discouraging frivolous or insubstantial appeals and in compensating successful appellees for the real but difficult-to-quantify intangible costs of prolonged litigation. It also furthers the public's interest in conserving judicial resources. It does not penalize a narrow or arbitrarily selected class of litigants. It applies

to all plaintiffs and all defendants who unsuccessfully appeal from money judgments or from other judgments with an ascertainable money value. States are entitled to great deference in establishing the procedures for enforcing their judgments. Because section 11-3-23 rationally furthers those legitimate state interests, it does not violate the Equal Protection Clause.

Point II: Appellant's Excessive Fines Clause and Due Process Clause challenges to the *size* of the punitive damage award were never presented below, even in Appellant's Petition For Rehearing. Those challenges cannot be heard on appeal, and they do not involve a conflict between lower courts or otherwise meet the Court's tests for discretionary grants of certiorari. Congress and state legislatures are actively considering legislation that would make it unnecessary to resolve the constitutional argument raised by Appellant—that punitive damage awards should be limited to the maximum monetary punishment authorized by the legislature for analogous conduct. In these circumstances, the tag-a-long writ of certiorari concerning these challenges to the size of the award should be dismissed as improvidently granted. *Mishkin v. New York*, 383 US 502, 512-13 (1966).

Point III: Appellant's Excessive Fines Clause argument has no merit because the Eighth Amendment has never been held to apply to *any* civil proceedings, and because there is no evidence that the framers of the Eighth Amendment intended that clause to limit the size of punitive damages awarded to private plaintiffs in civil tort litigation. The common law and colonial history is to the contrary. Indeed, no English or American court has ever endorsed the misleading interpretation of English common law Appellant urges on this Court. Furthermore, Appellant's proposed test for determining the "excessiveness" of an award would destroy the social utility of such awards, would be unworkable, and would require

courts to make policy judgments they are ill-equipped to make.

Point IV: Appellant's Contract Clause challenge to the award of *any* punitive damages was never raised below, and is not properly before the Court. Furthermore, it has no merit because the Contract Clause does not apply to judicial actions, *Tidal Oil Co. v. Flanagan*, 263 US 444, 451 (1923), and because the decision of the Mississippi Supreme Court was only concerned with *tort* law issues, and did not even arguably change the terms of Appellant's *contractual* obligations to Appellee.

Similarly, Appellant's "change of law" Due Process Clause challenge to *any* punitive award was not properly raised below, and has no merit. The Mississippi Supreme Court did not change the law in any respect. It expressly reaffirmed prior law. Furthermore, the jury awarded punitive damages under jury instructions embodying existing law that were proposed, or consented to, by Appellant.

ARGUMENT

Although Appellant discusses its challenge to section 11-3-23 of the Mississippi Code last, and only in passing (App. Br. 43-48), we will begin with that issue because, as we will show *infra*, it is the only issue properly before the Court.

I. SECTION 11-3-23 RATIONALLY PROMOTES SEVERAL LEGITIMATE GOVERNMENTAL INTERESTS IN A NONDISCRIMINATORY MANNER AND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This is *not* a case in which costs or penalties have prevented an indigent litigant from utilizing trial or appellate procedures available to others. Appellant fully utilized Mississippi's trial and appellate processes. Ap-

pellant's complaint is not that it has been prevented from appealing, but that having *exercised* that right it has been penalized because its appeal was unsuccessful.

The penalty statute applies to all parties, *whether plaintiff or defendant*, who unsuccessfully appeal from a money judgment. Appendix; *see, e.g., Eagle Lumber & Supply Co. v. Robertson*, 161 Miss. 17, 135 So. 499 (1931). And it applies in other cases *not* involving a money judgment where the money value of the dispute can objectively and readily be determined. Appendix; *see, e.g., Hart v. Catoe*, 393 So. 2d 1346 (Miss. 1981). Limiting the penalty to cases involving a readily ascertainable money value enables potential appellants to calculate the penalty before appealing, and permits the amount of the penalty (and thus its deterrent effect) to increase proportionally as the value of the dispute between the parties increases. But because the penalty does not apply to all appeals, Appellant contends that application of the penalty to it violates the Equal Protection Clause.[8]

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[8] Appellant's brief also refers once, in passing, to the Due Process Clause (App. Br. 44), but fails to explain how it supports Appellant's challenge to section 11-3-23. By providing a fair trial, and a right to appeal that Appellant exercised, Mississippi satisfied due process requirements. *Lindsey v. Normet*, 405 US 56, 77 (1972); *Ortwein v. Schwab*, 410 US 656, 659-60 (1973); *United States v. Kras*, 409 US 434 (1973).

Appellant argued below that it was denied due process because it was required to pay the penalty without a separate hearing to contest its appropriateness or legality. Appellant has not made that argument here, and it is meritless. First, Appellant was afforded a hearing on the merits of its appeal, and knew the penalty would be imposed if the appeal was unsuccessful. Appellant's position is no different from that of any other party who is given a hearing, knowing that there will be financial consequences if it does not prevail (*e.g.*, in some states, an unsuccessful appellant automatically must pay some or all of the costs of appeal and/or attorneys fees). None of this Court's prior decisions supports

A. Because Section 11-3-23, As Applied, Does Not Involve A Suspect Classification, Does Not Impinge On A Fundamental Right, And Does Not Prevent Access To The Courts, It Should Be Reviewed Under The Traditional Rational Basis Test.

Appellant conceded below that the statute could "be upheld as constitutional" if it is "rationally related to a legitimate legislative purpose and a logical connection . . . exist[s] between the statutory purpose and the classification created by the statute." J.S. App. 113a. That concession was compelled by this Court's prior decisions.

Despite its concession below, Appellant now indirectly suggests a standard of review that would prohibit *every* legislative classification that financially burdens some litigants, but not all, even if there were a rational basis for the classification. App. Br. 48. Indeed, under Appellant's standard, even a compelling state interest would apparently not save a classification that treated any class of litigants differently from any other class. *Id.*

This Court has repeatedly held that legislative classifications not involving suspect classifications or impinging on fundamental rights are "presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *E.g., City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985). Thus, in *United States v. Kras*, 409 US 434, 436 (1973), the Court held that even where a statutory fee denied an indigent party access to bankruptcy proceedings, "the applicable standard, in measuring the propriety of Congress' classifica-

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Appellant's assertion that this is a denial of due process. Second, Appellant had ample opportunity to challenge section 11-3-23, either in its direct appeal or in a declaratory judgment action challenging the constitutionality of section 11-3-23. *See Lindsey* (declaratory judgment action challenging double bond provision); *cf. Ortwein* (parties challenging filing fee petitioned for writ of mandamus ordering appellate court to accept cases without payment of fees).

tion, is that of rational justification." And in *Ortwein v. Schwab*, 410 US 656 (1973) (per curiam), the Court rejected an indigent plaintiff's contention that an appellate court filing fee imposed on some civil litigants, but not others, constituted a denial of equal protection. Observing that the statute did not employ a suspect classification, the Court held that "[t]he applicable standard is that of rational justification." 410 US at 660. *See, e.g., Schweiker v. Wilson*, 450 US 221, 230 (1981); *Vance v. Bradley*, 440 US 93, 97 (1979).

Appellant does not argue that section 11-3-23 involves a suspect classification, or impinges on a fundamental right. Nor does Appellant argue that the risk of the financial penalty authorized by section 11-3-23 prevented it from exercising its right to appeal.[9] Accordingly, section 11-3-23 should be judged under the rational basis test.

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[9] Application of section 11-3-23 could conceivably prevent an impoverished litigant from exercising its right to appeal, though there is no record of section 11-3-23 being applied in that manner in its 130 year history. But Appellant does not have standing to challenge the constitutionality of section 11-3-23 as applied to such a hypothetical litigant. *See, e.g., Broadrick v. Oklahoma*, 413 US 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."); *McGowan v. Maryland*, 366 US 420, 429 (1961) (general rule is that a litigant may only assert his own constitutional rights or immunities); *United States v. Raines*, 362 US 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."); *Lindsey v. Normet*, 405 US 56, 65 (1972). Moreover, a litigant able to pay a judgment will in all probability be able to pay 15% more. And the penalty does not prevent appeals because it is applied *after* resolution of the appeal, not before.

Even the principal case relied upon by Appellant, *Lindsey v. Normet*, 405 US 56 (1972), used a "mere rationality" test. In *Lindsey* the Court expressly rejected the tenants' argument "that a more stringent standard than mere rationality should be applied" to alleged restrictions on their right of meaningful access to trials and to appeals. 405 US at 73. The Court upheld a portion of the challenged statute that allegedly impaired access to trial courts by one class of litigants (tenants) because that classification was "rationally related" to a legitimate purpose. *Id.* at 74; *see also id.* at 70, 71. It struck down a different portion of the statute which effectively prevented that class of litigants from appealing, because that classification was "arbitrary and irrational." *Id.* at 79. Thus, the question here, as in *Lindsey*, is whether the statute satisfies the "mere rationality" standard.

B. Because Mississippi's Interests Are Legitimate, And Section 11-3-23 Rationally Furthers Those Interests, The Statute Is Constitutional.

If a full and fair trial on the merits has been provided, States are not constitutionally required to provide a right to appeal. *Lindsey*, 405 U.S. at 77.[10] Mississippi could have made all appeals discretionary, with the right to appeal dependent upon a threshold showing of substantial merit. But that would have imposed a serious burden on its judicial system, and would have required judges to make highly subjective judgments concerning the merits of appeals before they had the benefit of full briefing and argument. *Walters v. Inexco Oil Co.*, 440 So.2d 268, 275 (Miss. 1983). Instead, Mississippi granted all parties in civil cases an automatic right of appeal from all final judgments.

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[10] *Accord Jones v. Barnes*, 463 US 745, 751 (1983); *Ross v. Moffitt*, 417 US 600, 611 (1974); *Griffin v. Illinois*, 351 US 12, 18 (1956); *National Union of Marine Cooks and Stewards v. Arnold*, 348 US 37, 43 (1954); *McKane v. Durston*, 153 US 684, 686 (1894).

Mississippi also recognized, however, that "an unfettered automatic right of appeal brings its own evils." *Walters*, *supra*, at 275. Unsuccessful litigants may take "meritless appeals . . . to subject their adversaries to more costs and expense, to squeeze a favorable settlement out of an impecunious plaintiff, and for less laudable reasons." *Id.* Accordingly, since 1857, in order to discourage frivolous or insubstantial exercises of that right of appeal, to compensate successful appellees for the intangible costs of defending appeals, and to conserve judicial resources, Mississippi has imposed an automatic penalty on unsuccessful appeals if the judgment below is affirmed without any modification, no matter how slight.[11]

Section 11-3-23 is rationally related to these legitimate state interests. First, by discouraging civil appeals unless the appellant believes there is a reasonable chance that some portion of the judgment will be reversed or modified on appeal, the statute furthers the state's "interest in discouraging frivolous appeals." *Walters*, *supra*, at 274. Nearly every jurisdiction has acted to penalize frivolous appeals, and Appellant concedes that there is a "legitimate state interest" in doing so. App. Br. at 46-47.[12] That concession is fatal because section 11-3-23

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[11] *Walters*, *supra*, at 274; *Illinois Cent. R. Co. v. George*, 241 Miss. 233, 130 So. 2d 260 (1961); *Shipman v. Lovelace*, 215 Miss. 141, 60 So. 2d 559 (1952).

[12] *See* R. Lynn, APPELLATE LITIGATION 289-305 (1985). Many of these provisions authorize courts to impose a penalty payable to the appellee that exceeds the appellee's costs or proven damages. For example, this Court's rules authorize the Court to award "double costs . . . [i]n appropriate instances." S. Ct. R. 50. *See also*, 28 U.S.C. § 2103 (authorizing double costs). States have enacted a wide range of penalties for appeals that are frivolous or brought only for purposes of delay. *E.g.*, Ariz. Rev. Stat. Ann. § 12-2106 (authorizing penalty up to 10% of money damages, and $500 in other cases); Ga. Code Ann. § 5-6-6 (10% of judgment); Mich. Gen. Ct. Rule 816.5, 861.5 (punitive damages of up to 10% of any money judgment appealed); Me. Rev. Stat. Ann. tit. 14, § 1802 (treble costs); N.H. Rev. Stat. Ann. § 490.14-a (double costs

plainly furthers this concededly legitimate interest: it imposes a certain penalty for unsuccessful appeals, and therefore makes it uneconomical to pursue frivolous appeals.[13] Because section 11-3-23 discourages frivolous appeals, it is constitutional even if it also discourages insubstantial, but arguably non-frivolous appeals, because under the rational basis test, a statute may be substantially over-inclusive and yet be constitutional.[14]

Second, Mississippi has a legitimate interest in discouraging appeals that are *insubstantial* or that have little chance of success, even if they are arguably not frivolous, and a legitimate interest in compensating successful appellees for the real but intangible costs of defending an appeal. Section 11-3-23 rationally furthers

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and interest on money judgment at the rate of 12%); Or. Rev. Stat. § 19.160 (whenever money judgment is affirmed, decree shall award damages for delay in amount of 10% of the judgment, unless it is evident that there was probable cause for taking appeal); Pa. R. App. P. 2744 (damages at the rate of 6% in addition to legal interest on the judgment); Wisc. R. Civ. P. 809.25(3), 809.83(1) (penalty of up to 10% of judgment, in addition to damages for delay and reasonable attorneys fees).

[13] Although Mississippi could have chosen to impose the penalty only after a discretionary judicial finding that the appeal was "frivolous," the legislature could also rationally decide that a certain penalty for an "unsuccessful" appeal would be a better deterrent.

[14] *See, e.g., Vance v. Bradley*, 440 US 93, 108 (1979) (holding statute constitutional under rational basis test "[e]ven if the classification involved here is to some extent . . . ove inclusive"); *Ohio Bureau of Employment Services v. Hodory*, 431 US 471, 490-91 (1977); *Massachusetts Board of Retirement v. Murgia*, 427 US 307, 316 (1976) (where statutory approach "rationally furthered" legitimate interest, fact that a more narrowly tailored statute could achieve that interest did not render statute unconstitutional under rational basis test); *Dandridge v. Williams*, 397 US 471, 484 (1970) (finding otherwise rational statute unconstitutional for overinclusiveness "would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws" it deemed unwise).

those interests. As this Court has recognized in many contexts, extended litigation entails significant costs for parties, and also for the State, even when it is not frivolous.[15]

Appellant does not deny that States may compensate successful appellees for the "costs, including attorneys' fees . . . incurred in defending the appeal." App. Br. 47. The "costs" of an appeal, however, are not limited to out-of-pocket expenses. They also include significant intangible costs that cannot be precisely measured, such as the emotional toll of participating in litigation and the strain of prolonged uncertainty in legal relations.[16] For example, how can you measure the emotional cost of forcing a successful plaintiff to loan the judgment he has recovered to the defendant while the case is pending on appeal, often (as here) for years.[17] Statutory post-judgment interest provides some compensation for the *economic* cost of delay in receiving payment, but no one

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[15] *See, e.g., University of Tennessee v. Elliot*, 478 US ——, 92 L.Ed.2d 635, 646 (1986) (discussing parties' interest in "avoiding the cost and vexation of repetitive litigation"); *Allen v. McCurry*, 449 US 90, 94 (1980) (discussing interest in relieving parties of cost and vexation of multiple law suits); *Montana v. United States*, 440 US 147, 153-54 (1979) (same); *Commission v. Sunnen*, 333 US 591, 597 (1948); *Reed v. Allen*, 286 US 191, 198-99 (1932); *Baldwin v. Iowa State Traveling Men's Association*, 283 US 522, 525 (1931); *Hart Steel Co. v. Railroad Supply Co.*, 244 US 294, 299 (1917).

[16] "The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs." 18 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 4403 at 15 (1981).

[17] Appellee sued in November 1980. He was awarded judgment in December 1981. The judgment was affirmed in September 1985. The judgment was paid in April 1986. (Appellee did not pay the $20,000 contract portion of the judgment until then, even though on appeal it challenged only the punitive damage portion of the judgment).

else is forced to lend his money to a party who has injured him, even if he will eventually receive statutory interest on the loan. Furthermore, the injured plaintiff often needs the judgment *immediately* in order to secure necessary medical treatment, or just to survive. Judgment plus interest three years later may come too late to provide meaningful compensation.[18] The Constitution does not require Mississippi to ignore these and other intangible costs. Mississippi's decision to provide compensation for costs that are real and substantial, but defy precise measurement, is not irrational.

Insubstantial appeals also *directly* affect state interests because they require the expenditure of "time and energy and resources" (*Walters, supra*, at 275) by the State's appellate system, and thus implicate "the public's interest in conserving judicial resources." [19]

Appellant principally contends that even if section 11-3-23 *does* rationally further these legitimate state interests, it is "underinclusive" because it does not apply to all appellants, only to those who appeal from judgments with an ascertainable money value. App. Br. 47-48. That is constitutionally irrelevant because under the ra-

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[18] This economic reality often enables parties who appeal from money judgments "to squeeze a favorable settlement out of an impecunious" appellee. *Walters, supra*, at 275. The penalty statute lessens the pressure on needy appellees to settle for less than the judgment rather than defend a lengthy appeal, and thus furthers the State's interest in protecting the integrity of judgments.

[19] *Nevada v. United States*, 463 US 110, 129 (1983) (quoting *Southern Pacific R. Co. v. United States*, 168 US 1, 49 (1897)). *See also University of Tennessee*, 92 L.Ed.2d at 644; *Allen v. McCurry*, 449 US at 94; *Commission v. Sunnen*, 333 US at 597. Section 11-3-23 furthers this state interest by telling "the litigants that the trial itself is a momentous event, the centerpiece of the litigation, not just a first step weighing station en route to endless rehearings and reconsiderations. It is designed to deter litigants in our trial courts from trying their cases 'with one eye on the Supreme Court.'" *Walters, supra*, at 274-75.

tional basis test, a statute that rationally furthers a legitimate state interest is constitutional even if it is underinclusive.[20] Indeed, *Lindsey* upheld a statute that rationally furthered the state's interest in encouraging prompt judicial settlement of certain kinds of disputes, even though the statute "single[d] out possessory disputes between landlord and tenant for especially prompt judicial settlement" and treated "tenants of real property differently from other tenants for purposes of possessory actions." 405 US at 70-71. The Court ruled that the statute "cannot be faulted for over-exclusiveness or under-exclusiveness." 405 US at 70.

Similarly, in *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541 (1948), the Court upheld under the rational basis test a statute making unsuccessful plaintiffs in stockholder derivative actions liable for the defendant's expenses, including attorney's fees, even though the statute did not apply to plaintiffs who owned more than five percent of the defendant's stock or to plaintiffs in cases other than stockholder derivative suits. 337 US at 552-53.[21]

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[20] *E.g., Clements v. Fashing*, 457 US 957, 969, 971 (1982) ("The Equal Protection Clause allows the State to regulate 'one step at a time' . . . A regulation is not devoid of a rational predicate simply because it happens to be incomplete.") (quoting *Williamson v. Lee Optical Co.*, 348 US 483, 489 (1955)); *United States Railroad Retirement Bd. v. Fritz*, 449 US 166 (1980); *Vance v. Bradley*, 440 US 93, 108 (1979) (quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 US 376, 385 (1960)); *New York City Transit Authority v. Beazer*, 440 US 568, 592 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 US 307, 314 (1976); *Dandridge v. Williams*, 397 US 471, 485 (1970); *Schweiker v. Wilson*, 450 US 221, 234-35 (1981).

[21] Many states compute penalties by reference to money judgments. *See* note 12, *supra*. Limiting the penalty to cases with ascertainable money values is rational for several reasons. Mississippi could rationally conclude that parties are more likely to file frivolous or insubstantial appeals in cases having an ascertainable money value than in other kinds of cases. They may want to force

The Court has ruled that penalty statutes like the one at issue are procedural mechanisms that do not affect the substantive rights of parties, only the procedures for enforcing those rights. *Burlington Northern Ry. Co. v. Woods*, —— US ——, 94 L.Ed.2d 1, 9 (1987). Furthermore, the Court has repeatedly recognized that states have legitimate and very strong interests in determining the appropriate procedures for operation of their judicial systems, including "the processes by which the [s]tate compels compliance with the judgments of its courts."[22] As the broad range of state and federal statutes and rules addressing concerns similar to those underlying section 11-3-23 reveals, the federal and state systems have employed many different methods to promote their interest in just and efficient trial and appellate systems.[23]

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a much lower settlement on a needy and impecunious appellee, or they may simply want to earn investment income, at higher than post-judgment interest rates, while the appeal is pending. Furthermore, the deterrent approach chosen by Mississippi, in which the penalty increases pro-rata as the value of the dispute between the parties increases, and in which the would-be appellant can calculate the amount of the penalty before deciding whether to appeal, can only be applied to appeals with an ascertainable money value.

[22] *Pennzoil Co. v. Texaco, Inc.*, —— US ——, 95 L.Ed.2d 1, 17 (1987). *See also Trainor v. Hernandez*, 431 US 434, 441 (1977) ("there are basic concerns of federalism which counsel against interference by federal courts . . . with legitimate state functions, particularly with the operation of state courts."); *Younger v. Harris*, 401 US 37, 44 (1971) (same).

[23] Holding section 11-3-23 unconstitutional would raise serious doubts about the constitutionality of many of those state and federal rules. For example, it would follow, *a fortiori*, that Fed. R. Civ. P. 68 (the offer of judgment rule) would be unconstitutional because that rule discourages *plaintiffs* from exercising their right to a *trial*, and subjects them to a mandatory and automatic monetary penalty even if their claims are *not frivolous* and they actually prevail at trial, unless they recover more than the defendant offered. In addition to this penalty, Rule 68 discourages plaintiffs from exercising their right to a trial by limiting their ability to recover attorneys fees in some cases, even where recovery of attorneys fees has been statutorily authorized. *See Marek v. Chesney*, 87 L. Ed. 2d

Whether section 11-3-23 embodies "the highest wisdom" or employs "the best conceivable" means to further that interest is irrelevant to whether it is rational. Many states have determined that penalty statutes are a rational way to promote just and efficient appellate systems. Virginia, Kentucky and Alabama have laws which, like section 11-3-23, impose mandatory penalties on unsuccessful appeals.[24] Other states have discretionary penalties for unsuccessful appeals. *See* note 12, *supra*. Although the details of these statutes vary, states should not be constitutionally foreclosed from adopting innovative approaches to further their legitimate interests.[25]

As long as legislative judgments about procedural rules do not employ suspect classifications, interfere with fundamental rights, or prevent access to trial and appellate systems, courts should not second-guess their wisdom simply because they do not uniformly affect all litigants. Instead, courts should adhere to the constitutional presumption that "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process," *Vance v. Bradley*, 440 US 93, 97 (1979), and should uphold such legislative judgments unless they are not rationally related to legitimate state interests. Because section 11-3-23 satisfies the rational relationship test, the judgment below should be affirmed.[26]

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1 (1985). Notably, legislatures often authorize recovery of attorneys fees after determining that absent such recovery many plaintiffs cannot afford to seek vindication of their rights at trial.

[24] Ala. Code § 12-22-72 (1986); Ky. Rev. Stat. § 26A.300 (1985); Va. Code § 16.1-113 (Supp. 1986).

[25] *E.g., Federal Energy Regulatory Comm'n v. Mississippi*, 456 US 742, 788 (1982) (O'Connor, J., concurring in part, dissenting in part); *Chandler v. Florida*, 449 US 560, 579 (1981); *Reeves, Inc. v. State*, 447 US 429, 441 (1980); *Addington v. Texas*, 441 US 418, 431 (1979); *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting).

[26] *Lindsey* does not require a different result. The "double bond" provision the Court there found "irrational" is different from sec.

II. APPELLANT'S FEDERAL CONSTITUTIONAL CHALLENGES TO THE SIZE OF THE PUNITIVE DAMAGE AWARD WERE NEVER PRESENTED BELOW, AND SHOULD NOT BE CONSIDERED NOW.

Although Appellant's appeal is based on its challenge to Mississippi's penalty statute, that is not its main concern. Ninety percent of its brief is devoted to questions that are completely unrelated to the appeal question, and could not be considered on appeal: the constitutionality of the size of the punitive damages award, and of *any* such award in the circumstances of this case.[27] *Mishkin*

11-3-23 in three important respects. First, *Lindsey* involved poor tenants who claimed that the "double bond" provision would not merely penalize them for unsuccessful appeals but would actually prevent them from exercising their right of appeal. Accordingly, *before* eviction proceedings were filed against them, they brought an equitable action to enjoin enforcement of that provision. 405 US at 59-60. As the Court noted, "[t]he discrimination against the poor, who could pay their rent pending an appeal but *cannot post the double bond*, is particularly obvious. For them, as a practical matter, *appeal is foreclosed*, no matter how meritorious their case may be." 405 US at 79 (emphasis added). Second, the "double bond" required unsuccessful tenant-appellants to pay "twice the rents accruing during the appeal" if they lost. 405 US at 74-76. Thus, in contrast to the 15% penalty at issue here, that statute "doubled the stakes." 405 US at 79. Third, the double bond requirement applied only to a very small class of litigants. Unlike section 11-3-23, it applied (a) only to defendants, and (b) only to defendants who were tenants. Thus, tenant-defendants were subjected to a penalty "faced by no other civil litigant in Oregon." 405 US at 79. States do not have a legitimate interest in so favoring landlords at the expense of tenants. As Justice Douglas noted, "the double-bond procedure is landlord legislation." 405 US at 81 (dissenting on other grounds). Because of these three factors, none of which is present here, the Court concluded that the double-bond requirement was "arbitrary and irrational." 405 US at 79.

[27] Appellant's challenge to any punitive damage award, in any amount, is addressed in Point IV, *infra*. Appellant only asserts claims based on the Excessive Fines Clause and the Due Process

v. New York, 383 US 502 (1966) makes clear that even when an appeal is properly before the Court, the Court is not required to consider non-appealable issues, and will decline to do so if the standards for granting certiorari are not satisfied.[28]

Under the well established standards for granting certiorari, the Court should not consider Appellant's Eighth Amendment and Due Process challenges to the size of the award because: neither of those challenges was presented to or considered by the court below, at any stage; the alleged decision below is not in conflict with any other decision, state or federal;[29] the alleged decision below is not inconsistent with prior decisions of this Court; and it is not essential that the Court resolve these constitutional questions now—indeed, it would be inappropriate

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Clause. This case does not involve the very different question of whether the *First* Amendment restricts damage awards that might chill protected expression. Accordingly, the libel cases cited by Appellant and its supporting *amici* are not in point.

[28] *See also De Backer v. Brainard*, 396 US 28 (1969); 16 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE Sec. 4016 (1969) ("Even if there has been an unrestricted notation of probable jurisdiction, finally, the Court may vacate the implied grant of certiorari as improvident, or may simply refuse to determine the nonappeal issue.") (footnotes omitted). Any other rule would greatly expand the obligatory jurisdiction of the Court, and would require the Court to consider issues that were otherwise not appropriate for discretionary review simply because those issues were raised in a case that involved appeal issues.

[29] Appellant has cited no decision, and Appellee has found none, holding that the Excessive Fines Clause or the Due Process Clause limit the size of punitive damages in tort actions. To the contrary, *see Hart-Anderson v. Hauck*, Civ. No. 85-498 (Mont. March 17, 1987) (rejecting contention that punitive damage award violated the Excessive Fines Clause, holding that "the Eighth Amendment applies only to criminal actions"); *Palmer v. A.H. Robins*, 684 P.2d 187, 217 (Colo. 1984) (en banc) (same). *Cf., Daugherty v. Firestone Tire & Rubber Co.*, 85 F.R.D. 693, 695 (N.D. Ga. 1980) (rejecting claim that punitive damage award constituted cruel and unusual punishment).

to do so because Congress and state legislatures are actively considering legislative solutions that would make it unnecessary to resolve these constitutional questions.

A. Neither Of The Grounds Relied Upon By Appellant To Challenge The Size Of The Punitive Damage Award Was Raised Below.

1. *The Excessive Fines Clause argument was not presented to the court below at any stage, and is not a mere "enlargement" of arguments that were presented below.*

It is undisputed that Appellant did not cite or rely upon the Eighth Amendment, or the Excessive Fines Clause of that Amendment, at *any* stage of the proceedings below. J.S. 12 & n.3. The Court has repeatedly said that it cannot and will not "decide federal constitutional issues raised here for the first time on review of state court decisions." [30] Given that longstanding rule, Appellant is forced to argue, citing only *Dewey v. Des Moines*, 173 US 193 (1899), that "the Excessive Fines Clause argument is but an 'enlargement' of the argument made to the court below and therefore that Clause may be invoked here." J.S. 12 n.3. If a litigant has raised a particular federal question below, it may urge in this Court additional "arguments" regarding that question, even if those arguments were not asserted below.[31] But *Dewey*

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[30] *Cardinale v. Louisiana*, 394 US 437, 438 (1969); *District of Columbia Court of Appeals v. Feldman*, 460 US 462, 482 n.16 (1983); *Webb v. Webb*, 451 US 493, 499 (1981). *See Wilson v. Cook*, 327 US 474, 483-84 (1946); *McGoldrick v. Compagnie Generale*, 309 US 430, 434-35 (1940); *Whitney v. California*, 274 US 357, 362-63 (1927); *Tacon v. Arizona*, 410 US 351, 352 (1973); *Street v. New York*, 394 US 576, 582 (1969); *Bailey v. Anderson*, 326 US 203, 207 (1945).

[31] "Parties are not confined here to the same *arguments* which were advanced in the courts below *upon a Federal question there discussed.*" Having, however, "raised only one Federal question in the court below," Dewey was not permitted to raise a related but

makes clear that the "mere enlargement" doctrine does *not* permit litigants to raise in this Court constitutional "questions" not raised below.[32]

The Excessive Fines Clause question is not a mere "enlargement" of the questions that *were* raised below, because it is not "necessarily connected" to the questions that were raised "so that the state court could not have given judgment [on the questions that were raised] without deciding it." 173 US at 198-99. The Mississippi Supreme Court could have decided every question that was raised below without "necessarily" deciding the Excessive Fines Clause question raised here for the first time. As in *Dewey*, the federal question Appellant seeks to raise here had not "been brought to the attention of

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different federal question in this Court. 173 US at 198 (emphasis added).

[32] In the state courts, Dewey alleged that an assessment on lots owned by him, a non-resident with no actual notice of the assessment, to pay for paving a street abutting those lots was "greater than the reasonable market value of said lots," and objected that the defendants were seeking to enforce against him "not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for, and regardless of the actual value of the same," but he did not specifically challenge the *assessment* by reference to any provision of the constitution. 173 US at 200. Instead, he argued unsuccessfully that "the imposition of a personal liability against him in excess of the value of all the lots was not due process," in violation of the Fourteenth Amendment. *Id.* at 195. In this Court he attempted to raise the related question of whether the assessment itself amounted "to a taking of property without due process of law," because the assessment exceeded the value of the property. *Id.* at 197. The Court *rejected* that attempt, finding that Dewey's second due process question was *not* a mere "enlargement" of the due process question he *had* raised below, even though he had specifically alleged all of the "facts upon which the [second] question might have been raised," and even though he had specifically relied upon the federal Due Process Clause in support of the question he did raise below. *Id.* at 198.

the court below." 173 US at 200. Accordingly, as in *Dewey*, Appellant may not raise that question now.

2. *Appellant did not expressly challenge the size of the punitive damage award on federal Due Process grounds on appeal, in its petition for rehearing, or even in its brief in support of its petition for rehearing.*

Appellant's claim that its federal Due Process challenge to the *size* of the award was presented below (J.S. 10-11; App. Br. 1-2) is disingenuous. On direct appeal Appellant did challenge the "excessiveness" of the award, but not on federal (or state) Due Process grounds.[33] It did raise *a* Due Process Clause challenge, but that was a categorical challenge to *any* award of punitive damages, not a challenge to the excessiveness of this particular award.[34] Furthermore, even in its Petition For Rehearing Appellant did not expressly rely on any due process clause, state or federal, to challenge the excessiveness of the award.[35] The only reference to due process in connec-

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[33] In its appeal brief to the court below, Appellant urged that court to use its supervisory power to find the punitive damage award excessive because it was much larger than the compensatory award (pp. 21-22); it was excessive in light of statutes from other jurisdictions (pp. 22-23); it was allegedly too large in relation to the nature of Appellant's acts (pp. 23-24); and it was excessive in relation to Appellant's net worth (pp. 24-25). Appellant did not cite, rely upon, or even mention any due process clause in support of any of those arguments.

[34] Appellant argued that "the award" of punitive damages violated its due process rights because the mere possibility of large and allegedly unrestricted punitive damage awards "whenever an insurer litigates a contested claim, has a substantial 'chilling effect' on the exercise of [the] fundamental right" of "access to the courts." Brief Of Appellant to the Mississippi Supreme Court 33-34. Appellant has abandoned this particular Due Process claim, and has not pressed or argued it here.

[35] The unspecified "constitutional principles" Appellant did mention in the Petition, whether state or federal, are apparently the

tion with Appellant's challenge to the size of the award is a passing reference in its Brief in Support of Petition For Rehearing, and even that reference is not expressly grounded in the federal Due Process Clause.[36]

Furthermore, Appellant did not raise these Excessive Fines or Due Process questions in its answer, at trial, in post-trial motions, or in its assignment of errors on appeal. Appellant does not and could not claim that these questions arose with urgency only after affirmance of the trial court judgment. Accordingly, under well-established and consistently-applied state practice, the Mississippi Supreme Court would properly have refused to consider

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"criminal safeguards and burden of proof" mentioned in the next sentence. Appellant has abandoned its reliance on those "constitutional principles" and has not pressed or argued them here. Furthermore, Appellant cannot complain that the jury used a preponderance standard, because that is the standard Appellant proposed in its jury instructions, which the court gave. R. 1138, J.A. 20; R. 1141, J.A. 21. And the preponderance standard is sufficient for "even severe civil sanctions." *Herman & MacLean v. Huddleston*, 459 US 375, 389 (1983); *Sedima v. Imrex Co.*, 473 US 479 (1985).

[36] The brief states, without elaboration or citation of authority, that the size of the award "violates due process, equal protection and other constitutional standards." (P. 9). This reference does not properly raise a federal claim. First, it could as well have been a reference to the due process clause of the Mississippi Constitution (Art. 3, sec. 14) as to the federal constitution. Accordingly, it will be deemed to refer to the state constitution. *Bowe v. Scott*, 233 US 658, 664-65 (1914); *New York ex rel. Bryant v. Zimmerman*, 278 US 63, 67-68 (1928); *Webb v. Webb*, 451 US 493, 497-501 (1981). Second, such a conclusory and unsupported reference is insufficient to raise a constitutional issue below. *Beck v. Washington*, 369 US 541, 553 (1962); *Webb*, 451 US at 498 n.4; *Stembridge v. Georgia*, 343 US 541, 547 (1952). Third, "[b]riefs and oral arguments before state courts . . . cannot be used to establish that a federal question was raised. *Live Oak Ass'n v. Railroad Commission*, 269 US 354, 357-58 (1926); *Lynch v. New York ex rel. Pierson*, 293 US 52, 54 (1934)." Stern, Gressman & Shapiro, SUPREME COURT PRACTICE 157 (6th ed. 1986).

those questions even if Appellant had unambiguously raised them in its Petition For Rehearing.[37]

B. The Court Should Not Consider A Constitutional Rule Limiting Punitive Damage Awards To The Maximum Monetary Punishment Authorized By The Legislature For Analogous Conduct Because Legislative Bodies Are Actively Considering Legislation That Would Make It Unnecessary To Resolve That Constitutional Question.

Punitive damages are subject to legislative restriction or even abolition. Several legislative bodies have enacted specific limitations on punitive damage awards.[38] And Congress and many other state legislatures are actively considering a broad range of restrictions on punitive damage awards.[39]

In these circumstances, it is not only unnecessary, but inappropriate, for the Court to rule that the constitution requires parity between puntive damage awards and leg-

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[37] *State v. Cabana Terrace, Inc.*, 153 So.2d 257, 260 (Miss. 1963). *Educational Placement Services v. Wilson*, 487 So.2d 1316, 1320 (Miss. 1986); *Mississippi State Highway Commission v. Rives*, 271 So.2d 725, 729 (Miss. 1973); *Hogan v. Cunningham*, 172 So.2d 408, 411 (Miss. 1965); *Comfort v. Landrum*, 52 So.2d 658, 659 (Miss. 1951); *Estes v. Memphis & C. Ry. Co.*, 119 So. 199, 202 (Miss. 1928).

[38] Appellant cites many of those legislative restrictions on punitive damages. App. Br. 12 n.1. As Appellant notes, several state legislatures have recently imposed limits on the size of punitive damage awards that can be granted in cases of bad faith refusal to pay insurance claims. App. Br. 35 n.18. Appellant does not argue that any of those legislatively imposed limits is unconstitutionally high. Thus, legislatures are beginning to address Appellant's concerns in ways that would make it unnecessary to resolve the constitutional issues Appellant raises here.

[39] *See* the Tort Litigation Reform Act of 1987, S. 554, introduced Feb. 19, 1987 and pending in the U.S. Senate Judiciary Committee. *See generally* Senate Report 98-476, 98th Cong., 2d Sess., on S. 44, and the *amicus* brief of Association of Trial Lawyers of America.

islatively authorized monetary punishments for analogous conduct, thereby preventing state legislatures from weighing the competing policy concerns and experimenting with varying solutions to whatever problems there may be. *See* note 25, *supra*.

* * * *

In sum, not one of Appellant's federal constitutional challenges to the size of the punitive damage award was considered by or presented to the Mississippi Supreme Court, and there is no conflict or urgent reason why this Court should resolve those issues now. Accordingly, the Court should dismiss the writ of certiorari with respect to those tag-a-long issues as improvidently granted. *Mishkin*, *supra* at 512-13; *De Backer*, *supra* at 32. Here, as in *Mishkin*, "the far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision." 383 US at 512-13. Here, as in *De Backer*, "given the barrenness of the record on this issue," the Court should "decline to pass on it." 396 US at 32.

III. THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT DOES NOT APPLY TO *ANY* CIVIL PROCEEDINGS, AND SHOULD NOT BE CONSTRUED TO RESTRICT PUNITIVE DAMAGE AWARDS TO THE MONETARY PUNISHMENTS FIXED BY STATUTE FOR ANALOGOUS CRIMINAL CONDUCT.

A. The Eighth Amendment Does Not Apply To *Any* Civil Proceedings.

In *Ingraham v. Wright*, 430 US 651 (1977), which is controlling and requires rejection of Appellant's claim, the Court squarely held that the Eighth Amendment does not apply to *any* civil proceedings.[40] It "was designed to

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[40] The Court noted that "the applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by

protect those *convicted of crimes.*" 430 US at 664 (emphasis added); *see also id.* at 671 n.40 (Amendment applies only after "a formal adjudication of guilt"). As the Court noted, the Eighth Amendment (like its common law predecessors) was designed to limit the power of *government* to fine or punish for its own benefit (430 US at 664), and was not intended to apply to "civil remedies" made available by government but "designed for the benefit of other parties." *Id.* at 668.[41] Thus, every case in which the Eighth Amendment has been found applicable involved a punishment which only the government itself could impose.[42]

Despite *Ingraham*, under the constitutional test proposed by Appellant, if a "civil" monetary award serves the functions of punishment and deterrence, it is subject to the Eighth Amendment and must be found excessive if it exceeds the criminal fine authorized for comparable

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its historical derivation." 430 US at 670 n.39. The Court relied heavily on that history. For example, the English Bill of Rights, from which the text of the Eighth Amendment was derived, provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted." As the Court noted in *Ingraham*, "Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments." 430 US at 665 (footnote omitted).

[41] Quoting *Uphaus v. Wyman*, 360 US 72, 81 (1959). In *Uphaus*, a court had found a party in contempt and ordered him jailed until he complied with the court's order. This Court rejected the contention that this "indefinite sentence" violated the Eighth Amendment, reasoning that in these circumstances even incarceration was "essentially a civil remedy designed for the benefit of other parties" rather than for the benefit of the state. *Id.*

[42] The majority and the dissent in *Ingraham* differed as to whether the defendant in *Trop v. Dulles*, 356 US 86 (1958) (plurality opinion) had been punished because of a conviction for desertion, or because of a dishonorable discharge from military service. *Compare* 430 US at 666-67 (majority) *with* 430 US at 687 n.3 (dissent). In either event, the punishment—expatriation and loss of citizenship—was a punishment only the government could impose.

conduct. Under that test, treble damage awards for violation of state and federal antitrust laws, environmental protection laws, laws authorizing civil penalties, and a broad range of other civil laws, would violate the Eighth Amendment. The federal RICO statute, for example, would violate the Eighth Amendment because it authorizes treble damages, as punishment and deterrence, for conduct that is criminal in nature, and does not limit those damages to the amount of the criminal fine authorized for that conduct. *See* 18 U.S.C. §§ 1963, 1964(c); *Sedima v. Imrex*, 473 US 479, 481-83, 491-92 (1985).

But even if the Eighth Amendment could be construed, as Appellant urges, to apply to *some* types of "civil" proceedings—for example, to proceedings *by government* to obtain a monetary fine or penalty *payable to government* for conduct that would also violate a criminal statute—there is no basis in history, and no reason in policy, to apply the Excessive Fines Clause to the civil tort proceeding at issue here.

In order to prevail on its Eighth Amendment claim in this case, Appellant must persuade the Court to rule, for the first time, not only that the Excessive Fines Clause of that Amendment applies in civil proceedings, but also that it applies in a civil tort proceeding brought by a private party; that it applies in state courts;[43] that it protects corporate entities;[44] that it imposes substantive

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[43] *See Eilenbecker v. District Court*, 134 US 31 (1890); *Pervear v. Massachusetts*, 5 Wall. 475 (US 1867) (Excessive Fines Clause is not applicable to states). *See* the discussion of this point in the *amicus* brief of Association of Trial Lawyers of America.

[44] *See Koway Enterprises, Inc. v. Pennsylvania Public Utility Commission*, 85 Pa. Comm. 1, 480 A.2d 1317 (1984) (holding that Cruel and Unusual Punishment Clause does not protect corporations and noting that "our research has not discovered any case . . . which extends the Constitutional protection against cruel and unusual punishment to corporate entities"); *cf. California Bankers Ass'n v. Shultz*, 416 US 21 (1974) (protection against compulsory self-incrimination does not apply to corporations); *United States*

limits on the amount of punitive damages that can be awarded *to private plaintiffs* in such proceedings; that the maximum amount that can be awarded is not within the broad discretion of the jury (subject to the supervisory powers of state courts), but is fixed by the maximum amount of the "fine" the legislature has chosen to specify as *one* of the criminal punishments for "similar or analogous improper business activities"; and that the award cannot exceed that amount regardless of the gravity of the defendant's conduct or the particular circumstances of the case even if that amount would be insufficient to deter the defendant, or others similarly situated, from similar conduct in the future.

To support these radical propositions, which would fundamentally change the scope and meaning of the Eighth Amendment, Appellant relies almost entirely on a lengthy but distorted analysis of the common law, particularly of the restrictions on "amercements" imposed by Magna Carta.

B. There Is No Evidence That The Framers Of The Eighth Amendment Intended The Excessive Fines Clause To Limit The Size Of Punitive Damages Awarded To Private Plaintiffs In Civil Tort Litigation.

There is no direct evidence that the framers of the Eighth Amendment intended the Excessive Fines Clause to limit the size of punitive damages awarded to private plaintiffs in civil tort litigation, and Appellant does not contend there is. Although punitive damage awards were available in civil tort cases prior to adoption of the Eighth Amendment, no case or commentator had ever suggested that they were subject to the restrictions of

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v. Morton Salt Co., 338 US 632 (1950) (right to privacy does not apply to corporations); *First National Bank of Boston v. Bellotti*, 435 US 765, 778-79 n.14 (1977) ("certain 'purely personal' [constitutional] guarantees . . . are unavailable to corporations").

Magna Carta or the English Bill of Rights, and they were not.[45] The total absence of caselaw support for Appellant's theory is not the result of two centuries of judicial insensitivity or ignorance. To the contrary, courts have never adopted Appellant's theory because the concerns underlying the restrictions on "amercements" and "fines" in Magna Carta and the English Bill of Rights (and on Excessive Fines in the Eighth Amendment), are completely different from the concerns Appellant has with punitive damages. Although Appellee disagrees with much of what Appellant and its supporting *amici* have to say about the history of Magna Carta, the English Bill of Rights, and English common law, even the points about which we agree are sufficient to demonstrate that the concerns underlying Magna Carta and the English Bill of Rights have no application to punitive damage awards to private plaintiffs in civil cases. In particular, the parties agree that:

1. "Amercements," and later "fines," were paid *only to the King*; unlike punitive damages, they were never paid to private litigants.

2. "Amercements," and later "fines," were payable to the King not just for great or serious offenses, but even for minor and trivial offenses.

Thus, unlike punitive damages, which can be awarded only in cases involving particularly culpable and reprehensible behavior, amercements were payable in *every* case. Amercements were so common, and were payable for such trivial offenses, that "most men in England must have expected to be amerced at least once a year."[46]

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[45] For additional discussion of this point, *see amicus* brief of Consumers Union of United States, Consumer Federation of America, and the National Consumers League.

[46] 2 Pollock & Maitland, THE HISTORY OF ENGLISH LAW 513 (2d ed. 1909) "In the thirteenth century amercements are being inflicted right and left upon men who have done very little that is wrong." *Id.* "No one could expect to pass through life (perhaps

3. For that reason, amercements became an important source of revenue to the King, on which the King greatly depended.[47]

Englishmen were understandably concerned that amercements would be set in large amounts even if the offender's conduct did not warrant that amount, simply because the King needed sizeable revenues. This "revenue-generating" concern was irrelevant to punitive damage awards, which were not payable to the King (and are not now payable to the government), and have never been a source of governmental revenue.

4. Persons subject to amercements were entirely "in the king's mercy." [48] Accordingly, the King, *to whom the amercement was payable*, set the amount of the amercement he would require to be paid before he would grant his mercy.

Englishmen were concerned that the King, to whom the amercement was payable, could himself set the amount, particularly because amercements were such an important source of revenue to the King. Because of this concern, Magna Carta provided that even though the King or his officers could continue, initially, to set the amount of the amercement, ultimately, the amount was subject to the judgment of a jury. This concern was and

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hardly through a single year) without being subjected to amercements." McKechnie, MAGNA CARTA 287 (2d ed. 1958).

[47] "In the early thirteenth century the income of England was growing and John could not tap it by any legal means. His royal expenses were increasing by the month and he could not press them down. Again and again the hard and calculating king tried new, ingenious, and often unscrupulous methods to raise money." Smith, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 131 (1955).

[48] "The process is this:-So soon as the offender's guilt is proved, the court declares that he is in mercy (in misericordia)." 2 Pollock & Maitland, *supra*, at 513. "Strictly speaking, the man's life and limbs and all that he had were at the King's mercy." McKechnie, *supra*, at 286.

is irrelevant to punitive damage awards because the plaintiff, to whom the award is payable, does not himself set the amount of the award, even initially; the amount is determined by a jury.

In view of these differences, it is not surprising that in Appellant's lengthy discussion of the common law, consuming four-fifths of its brief, Appellant has failed to cite a single English decision holding that the restrictions in Magna Carta and the English Bill of Rights on the size of "amercements" or "fines" also restricted the size of punitive damages paid to private parties in civil litigation. Appellant has also failed to cite a single colonial decision to that effect. The absence of such case-law is not accidental. English common law has always regarded punitive damages awarded to private plaintiffs in tort cases as completely different from amercements or fines payable to the Crown. Therefore, the amount of such damages has never been restricted by Magna Carta or the English Bill of Rights, but only by the judge-made common law rule that the amount not be so outrageous as to shock the conscience.

Thus, in the first English case explicitly recognizing punitive damages, *Huckle v. Money*, 95 Eng. Rep. 768 (1763), the court refused to set aside an award of "exemplary damages" of 300 pounds, even though "the personal injury done to [plaintiff] was very small" so that damages of "perhaps 20 [pounds] would have been" sufficient to compensate the plaintiff for his injury. 95 Eng. Rep. 768-69. The Court was certainly aware of Magna Carta, which it cited twice in its opinion (*id.* at 769) as relevant to other issues. But on the issue of the alleged excessiveness of the exemplary award, it expressly ruled that "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances." *Id.* at 768. The court held that it is the province of the jury to assess

tort damages, remarking "that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which *all mankind at first blush must think so*, to induce a Court to grant a new trial for excessive damages." *Id.* at 769 (emphasis added).

Later that year, in a tort action between private parties, the court refused to set aside another "exemplary damages" award that was allegedly excessive, holding again that the jury "are the proper judges of the damages." *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794, 795 (1764). Two years later, in another tort action between private parties, the court refused to set aside a jury award that was allegedly excessive even though Lord Mansfield "acknowledged that he thought the damages were very great, and beyond the proportion of what the [plaintiff] had suffered." *Benson v. Bart*, 3 Burr. 1846, 97 Eng. Rep. 1130 (1766). Nevertheless, although the damages were much larger than would be appropriate as compensatory damages, the award was within the discretion of the jury.

Between 1763 and 1791, when the Eighth Amendment was ratified (and even to the present day), no court applied the restrictions on "amercements" or on "fines" contained in Magna Carta or the English Bill of Rights to the right of civil plaintiffs to recover exemplary or punitive damages in tort actions. Accordingly, when Blackstone published his Commentaries in 1768, it is not surprising that the only situations he mentions in which Magna Carta or the English Bill of Rights even arguably restricted the amount of a monetary payment were situations "in which, if the private plaintiff prevailed, the defendant was required to pay a fine *to the Crown*." [49]

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[49] *Amicus* brief of Aetna Life Insurance Co., et al. at 20 (emphasis added) (citing 3 W. Blackstone, *Commentaries on the Law of England* *118-19, *138, *179, *188, *398, *402 (1768)).

This was the history with which the framers of the Eighth Amendment were familiar. It was a history in which English common law had restricted the size of monetary payments to the Crown, but had not imposed any restrictions on the size of monetary payments to private litigants except the judge-made restriction that they not shock the conscience. Absent any indication (and Appellant and its supporting *amici* have provided none) that the framers of the Eighth Amendment intended to constitutionalize and confer on defendants in purely private tort litigation *greater* rights than they had been accorded by English common law, or by the Colonial courts, it would be inappropriate at this late date in our constitutional history to impute such an intention to the framers.

The history of punitive damage awards in the century *after* the Eighth Amendment was adopted confirms this understanding. Appellant twice cites W. Hale as an authority on this subject (App. Br. 28, 31), though misleadingly. Hale describes the "well-established principle" that juries may award punitive damages, "by way of punishment and warning," that are based on "the enormity of [the] offense rather than the measure of compensation to the plaintiff." W. Hale, HANDBOOK ON THE LAW OF DAMAGES 301, 301 n.1 (2d ed. 1912). Hale explains, *supra*, at 303, that:

> "the principle owes its origin to the old rule that the jury were the sole judges of the damages. Then, as now, when a wrong was accompanied by circumstances of aggravation, the jury was prone to return a verdict for large damages, *which the court was powerless to set aside.*"

C. Appellant's Proposed Standard For Determining Whether A Punitive Damage Award Is Excessive Within The Meaning Of The Excessive Fines Clause Would Destroy The Social Utility Of Such Awards, Is Not Supported By History, And Would Be Completely Unworkable.

Appellant argues that the standard for measuring "the excessiveness of a punitive damage award imposed by a civil jury should be the relationship of a punitive damage award to the monetary punishment exacted by the legislature of that jurisdiction (and, as necessary, other jurisdictions) for the same or similar conduct." App. Br. 35.[50] This is not a new argument. It has been raised and rejected before. In his summary of case law at the turn of the century, after noting the argument, Hale observes that while statutes limit "the pecuniary fine upon a criminal prosecution for such an act, there is but a vague limit to the exemplary damages which a jury may find in a civil action." Hale, *supra*, at 306.[51]

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[50] Appellant does not suggest any standard for determining whether a *legislatively authorized* punishment is excessive. Its standard assumes that all legislatively authorized punishments are constitutional, an assumption that was squarely rejected in *Solem v. Helm*, 463 US 277, 288 n.14, 290 (1983).

[51] This Court has rejected arguments very similar to the argument pressed by Appellant. In *United States v. United Mine Workers of America*, 330 US 258, 304-05 (1947), the Court held that "a fine of $700,000 . . . would not be excessive as punishment" for a criminal contempt, even though the maximum criminal fine for the underlying conduct was $5,000. The majority squarely rejected Justice Murphy's dissenting opinion, which argued that "when Congress prescribes a maximum penalty for criminal violation of a statute, that penalty fixes the maximum that can be imposed . . . for contempt for violating an order" to obey the criminal statute. 330 US at 382. More recently, in *Silkwood v. Kerr-McGee Corporation*, 464 US 238 (1984), this Court considered whether a punitive damage award of $10,000,000 in a case arising out of a plutonium leak from a nuclear facility was preempted by federal law authorizing a maximum civil fine for such conduct of $25,000. 464 US at 283 n.13. Relying on Congress' comprehensive regulation of nuclear facilities and the need for uniform laws governing those facilities,

Requiring parity between punitive damage awards and criminal fines would completely destroy the social utility of such awards, which have been available in most states for many years.[52] Because criminal fines are usually only one element of the criminal penalty, they are usually relatively small. In cases (such as this) where the defendant can gain enormous profits by engaging in the conduct the state's tort law seeks to discourage, the prospect of an occasional and relatively modest financial penalty, the size of which can be calculated in advance, will not deter that conduct.[53] The possibility of the penalty will simply be treated as a cost of doing business. For this reason, it is not surprising that Appellant's proposed test for measuring the excessiveness of punitive damage awards has never been adopted by any court, and finds no support in the history of Magna Carta or the English Bill of Rights.

1. *Under Magna Carta and the English Bill of Rights, excessiveness was not measured by reference to legislatively fixed monetary punishments.*

Magna Carta did not require proportionality between amercements and monetary punishments exacted by Par-

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Justice Powell's dissent argued that "[b]y establishing maximum fines, Congress implicitly stated its views on the size of monetary penalties it deemed sufficient to achieve both punishment and deterrence." *Id.* A majority of the Court rejected this view. Recognizing that large punitive damage awards complement, rather than undercut, smaller legislatively prescribed fines, the Court held that "the award of punitive damages in the present case does not conflict" with the federal remedial scheme. 464 US at 257. *Cf. Tull v. United States*, —— US ——, 107 S. Ct. 1831, 1838 n.7 (1987) (noting that punitive damages "is not a fixed fine.").

[52] *Day v. Woodworth*, 54 US (13 How. 363 (1851)); *Martinez v. State of California*, 444 US 277, 282 (1977); *Silkwood v. Kerr-McGee Corp.*, 465 US 238, 258 (1984).

[53] That is particularly true in bad faith insurance cases because the compensatory portion of the award will almost never exceed the policy benefit the insurer should have paid anyway.

liament because there were no such punishments. The amercement was, itself, the equivalent of a criminal fine. *Solem v. Helm*, 463 U.S. 277, 284 n.8: "An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th-century England." It was the *only* fine or monetary punishment exacted by the government. Accordingly, Magna Carta only required proportionality between the amount of the amercement *and the offender's conduct*.[54] If the amercement was proportional to the gravity of the offense, it could be assessed in any amount, so long as it did not deprive the offender of the means of livelihood.[55] Obviously, an amercement that was less than one percent of a merchant's net worth (as is the punitive damage award here) would not deprive that merchant of his livelihood, and would not have been considered excessive under Magna Carta.

Subject only to these "proportionality to the offense" and "livelihood" restrictions, the jury had unlimited discretion to determine the appropriate amount of the amercement by taking into consideration all the circumstances of the case, including "the offender's wealth or poverty, . . . [and] all those 'circumstances of the particular case' that the rigid rules of ancient law had ignored." 2 Pollock & Maitland, *supra*, at 514.[56] Indeed,

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[54] 2 Pollock & Maitland, *supra*, at 515 ("amercements should vary with the gravity of the offense"); McKechnie, *supra*, at 286, 288.

[55] "In no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him." McKechnie, *supra*, at 287; *id.* at 288-89; 2 Pollock & Maitland, *supra*, at 515. As Blackstone explained, this restriction "means *only*, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving . . . to the trader his merchandize." 4 Blackstone, *supra*, at 379 (emphasis added).

[56] *See also* 4 Blackstone, *supra*, at 379 (amercements to be taxed "according to the *particular* circumstances of the offence and the offender."); McKechnie, *supra*, at 286 ("the amounts taken were

as Blackstone noted in 1786, when amercements had been replaced by criminal fines, even those fines usually varied according to the defendant's ability to pay:

> . . . the duration and quantity of [imprisonment and fines] must necessarily vary, from the aggravations or otherwise of the offense, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, *what is ruin to one man's fortune, may be a matter of indifference to another's.* . . . Our statute law has not therefore often ascertained the quantity of fines, *nor the common law ever.*"

4 Blackstone, *supra*, at 377-78 (first emphasis in original).[57]

In support of its claim that Magna Carta required proportionality between amercements and legislatively fixed monetary punishments (App. Br. 38), Appellant cites only one case, which does not support its claim. The *Earl of Devon's Case*, 11 State. Tr. 1354 (1689), was a *criminal* prosecution for a minor assault. There

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regulated partly by the wealth of the offender, and partly by the gravity of the offense").

[57] In *Day v. Woodward*, 54 US (13 How.) 363, 371 (1851), the Court noted that punitive damage awards also had "been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the particular circumstances of each case." In this case the jury found that Appellant's contemplation of the possibility of a $3,000 penalty (arising from Appellant's mistaken belief that Mississippi was only a "penalty state"), was a matter of indifference to Appellant. Obviously, a punitive damage award of $1,000, which is the maximum criminal fine authorized by the Mississippi statute Appellant contends is analogous (App. Br. 14 n.3 & 33), would be a matter of complete indifference to Appellant, and would not deter it or other insurance companies from similar conduct in the future.

was no jury. The defendant pleaded guilty, and the judges imposed an immense criminal fine of 30,000 pounds. On appeal, the defendant challenged the excessiveness of the fine on many grounds, chief of which was that the fine was disproportional to the offense.[58] As we have explained, *that* argument *was* rooted in the principles of Magna Carta. The defendant also argued that there were *additional* restrictions on the size of criminal fines that judges, acting without juries, could impose. 11 St. Tr. at 1363-64. The defendant advanced six arguments in support of this claim, the fifth of which —mentioned in passing in one sentence—was that "wherever the law has set down a fine . . . it seldom exceeds 2,000 [pounds]." 11 St. Tr. at 1364.

The two paragraph opinion of the House of Lords setting aside the fine does not adopt or even mention that argument, and does not compare the size of the fine with the size of other fines authorized by Parliament. There was no need to do so because the fine was disproportional to the *offense*, and thus in violation of Magna Carta.[59]

Thus, the sole authority cited by Appellant to support its central argument in this case—that the common law "inquired into excessiveness—by reference to the more recent development of statutes as the primary means of setting criminal punishments," App. Br. 39—is nothing more than a one sentence argument raised by a litigant three centuries ago. The *Earl of Devon's Case* does not support Appellant's proposed test for measuring exces-

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[58] 11 St. Tr. at 1364: "the offence and punishment do not seem to bear a proportion."; *id.* at 1366: "I conceive with submission, that the punishment and offence don't in any measure bear proportion."

[59] The House of Lords held "that the fine of 30,000 [pounds] imposed by the court of King's-bench upon the earl of Devon, was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." 11 St. Tr. at 1370.

siveness even as applied to criminal fines imposed by judges, and certainly not as applied to awards, by juries, of exemplary damages.

In sum, Appellant's contention that Magna Carta requires proportionality between the amount of an amercement and the amount of legislatively fixed monetary punishments is baseless. Under Magna Carta, the gravity of the offense and the "livelihood" of the offender were the sole criteria for determining whether an amercement was excessive. Within those criteria, the jury had unlimited discretion.

2. *Appellant's test for measuring excessiveness would be completely unworkable, and would require courts to make substantive and policy judgments they are ill-equipped to make.*

In violation of this Court's rules, Appellant fails to "specify[] with particularity the relief" it seeks. Rule 34.1(j). That is not surprising. Using Appellant's test to fashion relief in this case, and in other punitive damages cases, would require courts to resolve innumerable questions. If punitive damages are to be limited to the maximum analogous criminal fine, how is a court to determine whether there *are* analogous crimes (in that jurisdiction or others), and if there are several, which is the most analogous?[60] If the scienter requirement in the criminal statute is less demanding than the standard for punitive damages, is the criminal statute, and its fine for less culpable conduct, analogous? If the criminal fine does not fix the absolute upper limit, but is only a guideline, what standard should courts employ in deciding whether

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[60] In Mississippi there is no closely analogous crime. There are several remotely analogous crimes. For example, Miss. Code Ann. Sec. 97-23-25 authorizes a $1,000 fine *and* ten years in jail for fraudulent appropriation of money delivered on deposit "or on any other contract or trust" to return the money "or its proceeds." Would this cover fraudulent retention of premium payments and failure to pay out policy benefits?

the "relationship" between the punitive award and the statutory fine has become so attenuated that the award is unconstitutional? What is the maximum award if there is no criminal analog? Are juries to be instructed concerning all possible criminal analogues, and allowed to choose among them, or will they exercise a meaningless "discretion," not knowing that their assessment of the appropriate damages is likely to be irrelevant? [61] If the maximum criminal fine is obviously insufficient to serve as a meaningful deterrent (as here), is the jury (or court) then free to assess a larger sum? [62] In assessing punitive damages, could the jury add to the amount of the criminal fine the monetary value of whatever *imprisonment* is authorized by the criminal statute? If so, what is the monetary value of one year, or ten years, in jail? [63] Could the jury add to the amount of the criminal fine the monetary value of the *stigma* of criminal conviction, or the value of the loss of voting rights, the revocation of a business license,[64] and other rights such convic-

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[61] At trial, Appellant proposed no instruction and offered no evidence concerning the maximum fine authorized by any Mississippi criminal statute.

[62] *Brooks v. Wooton*, 355 F.2d 177 (2d Cir. 1966), upheld a punitive damage award of $6,500 against a motorist who caused an accident while intoxicated. The maximum criminal fine for that conduct was $25. *See* Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 411 (1967). Under Appellant's theory, that award violated the Eighth Amendment.

[63] Individuals usually lose their ordinary sources of income while imprisoned. Computation of a comparable penalty for a corporation, which cannot be imprisoned, would require courts to take into account the income the corporation would lose if it were forced to cease business for a year, or ten years. Appellant's annual income is approximately $150 million per year. R. 762.

[64] Appellant contends that it should not have to pay punitive damages greater than the $1,000 criminal fine authorized for violation of Miss. Code Ann. Sec. 85-5-35. App. Br. 33. But in addition to the criminal fine, violation of 85-5-35 can also result in revocation of "the license of such person to transact the business of insurance" in Mississippi. *See* 83-5-49; 83-5-41; 83-5-39.

tion entails?[65] Would it violate the Eighth Amendment if states authorized criminal fines for analogous conduct of one percent of a corporate defendant's net worth, and juries then assessed punitive damages at that rate? Would the criminal fine fix the maximum for punitive damage awards if a state had made it clear that it did not want to limit the discretion of juries to impose higher punitive damage awards for comparable conduct?[66] In that case, how large an award would the Eighth Amendment permit?

As these questions indicate, evaluating the constitutionality of civil sanctions by reference to criminal sanctions is doomed to failure because the civil justice system and the criminal justice system are designed to *complement* each other, not to *copy* each other. *Sedima v. Imrex*, 473 US 479, 492-93 (1985). Both systems play important, but different, roles in regulating undesirable social behavior. Fine-tuning the complex inter-relationships between these two systems is quintessentially a matter for legislative judgment.

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[65] "The money judgment assessed against the punitive damages defendant hardly seems comparable in effect to the criminal sanctions of death, imprisonment, and stigmatization." Comment, *supra* note 62, at 408, 411. And even the criminal "fine, unlike punitive damages, still carries the full weight of stigma associated with criminal conviction." *Id.*

[66] State legislatures have the power to cap punitive damage awards if they choose to do so. They are obviously aware that such awards frequently exceed the maximum criminal fine for comparable conduct. Accordingly, their inaction reflects a policy choice to allow large punitive damage awards as a supplement to the criminal law. In 1986, the Mississippi legislature defeated H.B. 307, which would have capped punitive damages at $150,000.

IV. APPELLANT'S CONTRACT CLAUSE AND DUE PROCESS OBJECTIONS TO THE AWARD OF ANY PUNITIVE DAMAGES IN THIS CASE SHOULD BE REJECTED.

In addition to challenging the size of the punitive damage award, Appellant also challenges *any* punitive damages in this case on Contract Clause and "retrospective" Due Process grounds.

A. The Contract Clause Issue Is Not Properly Before The Court, And Has No Merit.

Appellant concedes that its Contract Clause argument —that the decision of the Mississippi Supreme Court changed the obligations of its insurance contract with Appellee—was not raised below, even in its Petition For Rehearing. J.S. 18 n.7. Thus, that issue is not before the Court. *See* note 30, *supra*. In any event, the argument is so frivolous that Appellant has not been able to cite a single authority to support it.

First, "[i]t has been settled by a long line of decisions" that the Contract Clause "is directed only against impairment by legislation, and not by judgments of courts. The language—'No state shall . . . *pass any* . . . *law* impairing the obligation of contracts'—plainly requires such a conclusion." *Tidal Oil Co. v. Flanagan*, 263 US 444, 451 (1923) (footnote omitted; emphasis in original).

Second, the Mississippi Supreme Court's decision did not even arguably impair or change the terms of Appellant's *contractual* obligations to Appellee. (Indeed, Appellant did not even challenge the award of contract damages on appeal.) The change of law claimed by Appellant was, at most, a change in its *tort law* obligations to Appellee. And that decision did not even change Appellant's tort law obligations, as Appellee will now show.

B. The "Change of Law" Due Process Clause Issue Is Not Properly Before The Court, And Has No Merit.

Appellant argues that in this case *any* punitive damage award, in any amount, violates the Due Process Clause because it is allegedly based on "a newly announced standard of liability imposed retrospectively to this case." App. Br. 40. This argument was raised for the first time in Appellant's Petition For Rehearing, J.S. 18 n.7. The Mississippi Supreme Court denied the petition. Ordinarily, questions raised for the first time in a petition for rehearing will not be considered by this Court.[67] In *Hathorn v. Lovorn*, 457 US 255 (1982), the Court announced a narrow exception to that general rule in a case involving a non-constitutional issue. This case does not come within that narrow exception, and Appellant has suggested no reason why that exception should be broadened to justify review here of a *constitutional* question raised below only in a petition for rehearing. *Hathorn* involved "apparently conflicting state and federal statutes," 457 US at 260, and there are strong policy reasons why this Court should resolve that type of conflict. But this case involves a *constitutional* question, and there are strong policy reasons why the Court should *not* resolve constitutional questions unless it is absolutely necessary to do so.[68]

Moreover, in *Hathorn* it was unclear (and the Court did not decide) whether the Mississippi Supreme Court had actually *decided* the federal statutory issue on direct

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[67] *Radio Station WOW, Inc. v. Johnson*, 326 US 120, 128 (1945); *Hanson v. Denckla*, 357 US 235, 243-44 (1958); *Herndon v. Georgia*, 295 US 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 US 156 (1932); *Forbes v. State Council*, 216 US 396 (1910).

[68] *E.g. Superintendent v. Hill*, 472 US 445, 453 (1985) (Court is required "to avoid unnecessary resolution of constitutional issues"); *Illinois v. Gates*, 459 US 1028, 1031 (1982) (Stevens, J., dissenting); *Ashwander v. Tennessee Valley Authority*, 297 US 288, 346-48 (1936) (Brandeis, J., concurring).

appeal, before the petition for rehearing, or had avoided deciding the question, both on appeal and also when it was raised in the petition for rehearing. 457 US at 264 & 265 n.15; *see also id.* at 260-61. In this case, however, it is indisputable that the court below did *not* decide the due process issue on direct appeal. In these circumstances, *Hathorn* may permit, but it does not require, the Court to resolve a federal constitutional question that was raised for the first time in a petition for rehearing.

Furthermore, Appellant's contention that it was "punished" without fair notice is remarkable because the punitive damages were awarded under instructions proposed or accepted by Appellant.[69] Appellant argues that the Mississippi Supreme Court changed the law in two respects: first, by allegedly ruling that punitive damages are available "regardless of wrongful motive, if the insurer *lacked* a legally sufficient 'arguable basis' for rejecting a claim," App. Br. 40; and second, by allegedly ruling that an insurer not only must have an arguable basis for denying a claim, but "must assert that precise basis in denying a claim in order to rely on that basis as a defense against a claim for punitive damages." App. Br. 40-41.

The jury instructions proposed by Appellant, and given by the Court, required the jury to find a wrongful motive, instructed the jury that it could not award punitive damages if Appellant had an arguable reason for refusing to pay the claim, and absolved Appellant of liability if Appellant *had* such an arguable reason, even if it had not asserted that reason when denying the claim. *See* note 69, *supra.* Substantial evidence was presented at trial showing that Appellant did *not* have an arguable reason for refusing to pay the claim (and instead de-

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[69] R. 1138, J.A. 20. *See also* R. 1141, J.A. 21. And see the first and second paragraphs of Jury Instruction P-19A, R. 1130, J.A. 19, proposed by Appellee and not objected to by Appellant. R. 1065-1066.

nied the claim because of its mistaken belief that Mississippi was only a "penalty" state). The jury was properly instructed on that issue, and found in favor of Appellee. Accordingly, it was not necessary to "change the law" in order to affirm the award; even if the Mississippi Supreme Court did change the law (and it did not), that change had no effect on Appellant.

As Appellant concedes, it has long been established in Mississippi that punitive damages are available when a breach of contract is "attended by some intentional wrong, insult, abuse, or gross negligence." App. Br. 40.[70] The court below did not change that law in any respect. It specifically reaffirmed the rule that punitive damages can be awarded only for "a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." J.S. App. 29a; 483 So.2d 269.[71] And it did not require insurers to *assert* an "arguable reason" when denying claims in order to rely on that reason at trial. It simply required insurers to *refrain* from asserting reasons they *knew to be illegal* when denying claims. That requirement is consistent with Mississippi's long-standing rule that when a breach of contract is attended by such an "intentional wrong," the jury is permitted to award punitive damages.

CONCLUSION

The Court should affirm the judgment below imposed under the authority of Miss. Code Ann. § 11-3-23. The Court should dismiss the writ of certiorari concerning Appellant's challenges to the punitive damage award as

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[70] That has been the rule in Mississippi since 1915. *See Pilot Life Insurance Co. v. Dedeaux*, 481 US ——, 95 L.Ed.2d 39, 49 (1987).

[71] Recently, the Mississippi Supreme Court has cited its opinion in this case as reaffirming that rule. *South Central Bell v. Epps*, Civ. No. 55870, slip op. at 12 (Miss. Sup. Ct., June 3, 1987).

improvidently granted; in the alternative, the Court should rule that the punitive damage award did not violate the Eighth Amendment, the Due Process Clause, or the Contracts Clause.

ERNEST R. SCHROEDER
VINCENT J. CASTIGLIOLA, JR.
P.O. Drawer 1529
1103 Jackson Avenue
Pascagoula, Miss. 39567
(601) 762-6631

BRUCE J. ENNIS, JR.*
KIT ADELMAN-PIERSON
PAUL R. FRIEDMAN
ENNIS FRIEDMAN & BERSOFF
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100

Attorneys for Appellee

* Counsel of Record

August 5, 1987

APPENDIX

APPENDIX

APPENDIX

STATUTORY PROVISION INVOLVED

Section 11-3-23 of the Mississippi Code Annotated (Supp. 1986) provides that:

> "In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum. If the judgment or decree be for the possession of real or personal property, the damages shall be assessed on the value on the property. If the judgment or decree be for the dissolution of an injunction or other restraining process at law or in chancery, the damages shall be computed on the amount due the appellee which was enjoined or restrained. If the judgment or decree be for the dissolution of an injunction or other restraining process as to certain property, real or personal, or a certain interest in property, or be a judgment or decree for the sale of property, or some interest in it, to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon or some interest in property, and the only matter complained of on the appeal is the decree as to some particular property or claim on it, the damages shall be computed on the value of the property or the interest in it, if the value of the property or interest in it be less than the judgment or decree against it; but if the value of the property or interest in it be greater than the amount of the judgment or decree against it, the damages shall be upon the amount of the judgment or decree; provided, however, the above penalty shall not be assessed against any condemnee appealing from a special court of eminent domain in any circumstances."

EDITOR'S NOTE

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CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

REPLY BRIEF OF APPELLANT

*THEODORE B. OLSON
LARRY L. SIMMS
TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Appellant

**Counsel of Record*

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL

COPELAND, COOK, TAYLOR
& BUSH
Post Office Box 2132
Jackson, Mississippi 39225
(601) 354-0123

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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I

JURISDICTION

Appellee's arguments concerning the Court's jurisdiction over Question 1, Br. of Appellee, at 20-27, revisit the same issues which were fully aired in his Motion to Dismiss, at 10-17, and presumably rejected when probable jurisdiction was noted. Appellant will respond only to the extent appellee's previous arguments have been re-packaged or where additional authorities have been presented.[1]

A. The Excessive Fines Clause Question

1. *The Presentation of the Excessive Fines Clause Question*

Appellee's arguments regarding the presentation of the Excessive Fines Clause question to the court below, Br.

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[1] Appellant will not respond to appellee's attempt to re-characterize the record below. Br. of Appellee, at 1-6. The relevant core of the proceedings below is that a Mississippi jury determined that appellant's handling of appellee's insurance claim was unfair or improper and merited a $1,600,000 penalty. Although the amount of the fine did not "shock . . . the judicial conscience" of five justices of the Supreme Court of Mississippi, four justices of that court found the magnitude of the fine either "grossly excessive" or completely unwarranted because of appellee's reliance on its highly qualified Medical Director. The simple fact that punishment of this magnitude may be exacted for conduct which so divides medical experts and the highest court of a state conveys telling messages concerning punitive damages.

Appellee's discussion of the trial court's instructions to the jury, Br. of Appellee, at 2 n.2 and 46 n.69, regarding punitive damages is incomplete and misleading. Appellee makes reference to only three of the instructions given to the jury regarding the standards pursuant to which punitive damages could be awarded and the amount of any punitive award. In the interest of completeness, all six of the pertinent instructions have been reproduced in the appendix to this brief. The confused, unintelligible standards pursuant to which the jury returned its verdict for punitive damages are relevant to, and mirrored by, the vague, shifting standards pursuant to which this verdict was affirmed by a narrow majority of the court below as discused in part III, *infra*.

of Appellee, at 22-26,[2] are primarily directed to the inartful manner in which this federal question was raised. Such lack of sophistication, however, has been held by the Court not to deprive it of the power to decide important constitutional questions, *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982). A unanimous Court applied this principle in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), on which appellant relied at the jurisdictional stage, *see* Reply Mem., at 7-8 & nn.5 & 6.[3]

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[2] Appellee reiterates arguments made in his Motion to Dismiss, at 13-17, that appellant was required to present its federal challenge to the magnitude of the punitive fine in the trial court both pre- and post-trial. Br. of Appellee, at 25. In renewing these arguments, appellee does not address the holding of the trial court that it had no power to consider appellant's challenge to the size of the punitive award, *see* J. S., at 10-12, a holding which deprived appellant of any "reasonable opportunity" to have its federal and state law challenges to the punitive damage award determined by that court. *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190, 194-95 (1925). Although *Central Union* was relied upon by appellant, Reply Mem., at 9, and is controlling, appellee does not even cite that case.

Appellee's argument is deficient in other crucial respects. Appellee cites *Educational Placement Services* v. *Wilson*, 487 So.2d 1316 (Miss. 1986), as establishing what he characterizes as a "consistently-applied" practice of the court below in refusing to consider questions not presented to the trial court, but neglects to bring to the Court's attention subsequently decided cases in which the court below decided issues raised for the first time on direct appeal. *See Town of Madison* v. *Bear Creek Water Ass'n, Inc.*, 510 So.2d 800 (Miss. 1987); *Griffin* v. *Mississippi*, 504 So.2d 186 (Miss. 1987). More importantly, neither appellee nor the cases he cites address the practice of the court below as regards the presentation of issues on rehearing. This Court recognized in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), that the court below regularly entertains questions raised for the first time on rehearing. *Pitts* v. *Mississippi State Bar Association*, 462 So.2d 340, 342 (Miss. 1985) (en banc), cited in appellant's Reply Mem., at 1, but not mentioned by appellee, confirms that practice.

[3] Appellee's failure to respond to *Beckwith* in his merits brief is understandable, because *Beckwith* is dispositive on this point. In that case, the appellant's memorandum of law filed in the state trial court—

Moreover, and contrary to appellee's assertion, appellant expressly challenged on federal grounds in the court below the excessiveness of the $1,600,000 award, asserting that the award "is excessive, constitutes an *excessive fine*, and violates due process, equal protection and other constitutional standards." J. S. App., 151a (emphasis added).[4] Appellant twice challenged the size of the award as "constitut[ing] [an] excessive fine." J. S. App., 139a, 151a.

Appellee, Br. of Appellee, at 22, objects that appellant did not cite expressly to the Excessive Fines Clause of the Eighth Amendment in its briefs in the court below But appellant's challenge to the punitive damage award as being an "excessive fine" is surely sufficient. In any event, the Court has made clear that a state court liti-

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apparently the only document in the record relied upon by this Court to sustain its jurisdiction—contained a series of state law challenges to the Florida statute at issue and apparently a single reference to the "pertinent provisions of the *Florida Constitution* and its Federal counterpart." 449 U.S., at 159 n.5 (emphasis in original). In the instant case, appellant's briefs in the court below, J. S. App., 124a-152a, much more clearly relied on the *Federal Constitution*.

In *Beckwith*, the Court observed that the federal question "appears to have been raised in the Supreme Court of Florida." 449 U.S., at 159 n.5. This observation of the Court was apparently based on an assertion to that effect by the appellant's counsel at oral argument in an exchange with Justice Blackmun. Although the Court did not appear to rely on that exchange in taking jurisdiction over that case, that exchange is in any event less substantial than the briefs of appellant filed in the court below in this case.

[4] Appellee's suggestion, Br. of Appellee, at 25 n.36, that appellant's reference to "due process, equal protection" in the court below may have constituted a reference to the guarantee of due process in Art. 3, § 14 of the Mississippi Constitution overlooks the fact that Mississippi's constitution contains no equivalent of the Equal Protection Clause of the Fourteenth Amendment. Thus, appellee's speculation requires concluding that appellant shifted from state to federal grounds within a single phrase of a sentence. Furthermore, when appellant relied on provisions of the Mississippi Constitution, it expressly cited those provisions by article and section. *See* J. S. App., 135a.

gant's failure to rely on the "correct" provision of the Federal Constitution is irrelevant to this Court's power to decide a federal question so long as the question brought here is "within the clear intendment" of the contention made below. *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954). Appellant relied on *Braniff* at the jurisdictional stage after appellee first raised this objection, Reply Mem., at 7-8 n.5. As with *Beckwith, supra*, appellee inexplicably does not even cite *Braniff*, which is indistinguishable and controlling. *See Webb* v. *Webb*, 451 U.S. 493, 501 (1981) ("we have not insisted" that "litigants identif[y] in the state courts precisely the provisions of the Federal Constitution . . . on which they rely . . . .").

Thus, the rule announced by this Court in *Webb* v. *Webb*, 451 U.S., at 501, requiring "that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature and substance of the federal claim at the time and in the manner required by state law," is fully satisfied in this case.

2. *The Excessive Fines Clause Question Is Worthy Of Plenary Consideration*

Appellee's contention that the Excessive Fines Clause question does not meet this Court's standards for the exercise of its certiorari jurisdiction is authoritatively refuted by the Court's direct statement just eighteen months ago in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986) slip op., at 13, 106 S. Ct. 1580, 1589 (1986) (emphasis added), characterizing the Excessive Fines Clause question as raising an "important" issue "which . . . *must* be resolved," and the Court's unrestricted notation of probable jurisdiction in this case.[5]

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[5] Appellee's argument, Br. of Appellee, at 26-27, that the Excessive Fines Clause question need not be reached because Congress and some state legislatures may be "actively considering a broad range of re-

B. The Due Process Clause and Contract Clause Question

Appellant expressly asserted below that the court had, in affirming the punitive damage award, "change[d] the law" regarding punitive damages in violation of "constitutional requirements of equal protection." J. S. App., 138a. Appellee contends, Br. of Appellee, at 44-45, that appellant cannot rely on the Contract Clause or the Due Process Clause in support of this federal challenge in this Court because those clauses were not cited to the court below and because this challenge was not raised until the rehearing stage.

Appellee's initial contention is overcome by the same authorities discussed above regarding appellant's entitlement to invoke the Excessive Fines Clause in this Court. Appellee's contention regarding the timeliness of this challenge ignores the fact that this federal question did not arise until the court below had formulated new substantive standards of conduct in 1985 and had imposed on appellant a $1,600,000 penalty for not having complied with those standards in 1979 and 1980. Thus, cases such as *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-87 n.9 (1980) *and cases cited* (litigants entitled to raise in this

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strictions on punitive damage awards" is singularly devoid of any specifics as to the nature of the legislation pending or the likelihood of its enactment. S. 544, cited by appellee in his brief at 26 n.39, would place no limit on the size of punitive damage awards.

Appellee's reliance, Br. of Appellee, at 27, on *Mishkin* v. *New York*, 383 U.S. 502, 512-13 (1966), to suggest that the record in this case does not present the Excessive Fines Clause question with "sufficient clarity," is misplaced. The Court's concern in *Mishkin* centered *exclusively* on the absence in the record of an evidentiary basis for deciding the fact-bound Fourth Amendment question presented. Whether the Excessive Fines Clause applies to punitive damages, in sharp contrast, is not dependent for its resolution on any facts; it is a pure question of federal constitutional law which can only be resolved definitively by this Court.

Court a federal question raised at first opportunity to do so in the state court system), require rejection of appellee's contention.

II

THE $1,600,000 PUNITIVE AWARD IMPOSED BY THE MISSISSIPPI COURTS VIOLATES THE EXCESSIVE FINES CLAUSE

A. Appellee's Arguments Against the Applicability of the Excessive Fines Clause Are Specious

The origin and development of the Eighth Amendment's antecedents must be examined and applied in this case in the context of a governmentally imposed, court approved, $1,600,000 fine levied in order to punish and deter perceived antisocial conduct—precisely the purposes served by the criminal law. The incontrovertible history of the English antecedents of the Excessive Fines Clause, *viewed in light of this purpose*, requires the result urged by appellant. Appellee avoids any discussion of the *purpose* of the punitive fine in this case and the *purpose* of English and American constitutional restrictions on excessive, governmentally imposed punitive fines. Instead, appellee advances two simple and closely related propositions which are critical to his position but which fall of their own weight when scrutinized.

The first proposition, Br. of Appellee, at 28, is that punitive damages must be distinguished from other governmentally imposed financial penalties because they are not extracted by the government "to fine or punish for *its own benefit*," *id.* (emphasis added), but rather are merely made available by the government "but 'designed *for the benefit of other parties.*' " *Id.*, *quoting Ingraham* v. *Wright*, 430 U.S. 651, 668 (1977) (emphasis added). Appellee's unstated premise is that punitive fines in civil cases are not intended primarily to serve the government's objectives. But that premise is plainly false, and the history

of punitive damages is to the contrary. Punitive damages are invariably justified as serving society's goals.[6]

Even assuming the validity of appellee's major premise, the logical fallacy in appellee's reasoning is his assumption that the government's involvement becomes immaterial merely because there may be some ancillary benefit to a private litigant. Such logic would, for example, authorize privately obtained injunctions against the printing of newspapers despite the First Amendment's prohibition against the government's obtaining such an order for its own "benefit." That is not the law.

Appellee's second, closely related proposition, Br. of Appellee, at 30-35, is that these punitive fines are "different" for constitutional purposes because they are "awarded to private plaintiffs" rather than paid to the government. *Id.*, at 30. Appellee seems to argue, Br., at 30-33, that the principal concern over amercements and fines reflected in Magna Carta and the English Bill of Rights is that they were set by and payable to the King and therefore subject to abuse whenever the Crown needed to generate additional revenue. This premise is, however, grounded in a myopic view of history.

Concern over excessive and disproportionate punishment has ancient roots that go far beyond the potential "conflict of interest" identified by appellee. From Genesis, Leviticus and the *lex talionis*, the concept of proportionality—equality between the crime and the punishment—has been abid-

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[6] Appellee's counsel advised the jury during his opening statement: "we are asking you to return to us a sizable verdict . . . not to compensate Lloyd Crenshaw, but to penalize this company and let them know that the people of Jackson County don't like their insurance claims handled in that manner." R. 174. The jury was subsequently instructed that punitive damages "are never awarded to benefit the injured party, but rather to punish and compel the wrongdoer to have due and proper regard for the rights of the public." R. 1130, App. 5a, *infra*.

ing and fundamental. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839, 844 (1969); Montesquieu, *The Spirit of Laws* *111 (bk. VI, ch. XVI) ("It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser . . . ."). And even if history were to the contrary—which it is not—"neither the antiquity of a practice nor the fact of steadfast . . . judicial adherence to it through the centuries insulates it from constitutional attack . . . ." *Williams* v. *Illinois*, 399 U.S. 235, 239 (1970).

Underlying appellee's argument is the proposition that American governments may achieve the retributive and deterrent purposes of punitive fines without regard to centuries-old restrictions on excessive monetary punishments by the simple expedient of turning those fines over to private persons. Appellee has, however, advanced no support in law, logic or history for his gossamer theory.[7]

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[7] Appellee also argues, Br. of Appellee, at 31, that amercements are "different" from punitive damages because the former were imposed not only upon "great or serious" offenses, but also for "minor and trivial" offenses, whereas punitive damages are awarded "only" where "particularly culpable and reprehensible behavior" is involved. Like appellee's other arguments, this one starts with a false premise and then stretches to reach conclusions which are untenable even if the premise were valid. The suggestion that punitive damages are available only for egregious, highly culpable conduct is simply wrong. They may be awarded for conduct which a jury finds to be "wanton" or in "reckless disregard for the rights of others" (Iowa), for "gross negligence" (Arizona) or even "rudeness" or "mere caprice" (North Carolina). *See* Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 870, 880-81 (1976). *See, e.g., Bonsignore* v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981) (New York City held liable for $125,000 punitive damage award to wife of police officer shot by her husband on basis of city's policy of requiring police officials to carry firearms while off duty). Even if this dichotomy actually existed, appellee does not suggest how this asserted "difference" would give rise to a distinction of constitutional dimension.

B. The Historical Relevance of the Amercements Clauses

Appellee acknowledges that a substantial consideration in determining whether the Excessive Fines Clause limits the magnitude of punitive damage awards is the historical derivation of that Clause. Br. of Appellee, at 27-28 n.40. Moreover, appellee does not dispute that the principal purpose served by amercements, fines, and punitive damages is to inflict punishment on the perpetrator of antisocial conduct in order to deter the wrongdoer and others from engaging in similar conduct. Br. of Appellant, at 25-26; Br. of Aetna Life Insurance Co., *et al.*, as *Amici Curiae*, at 10-11 ("Br. of Aetna"). However, appellee asserts that Chapter 20 of Magna Carta was concerned only with limiting the ability of the Crown to determine the size of potential amercements which would be paid into its coffers. But neither the text nor historical application of Chapter 20 provides any support whatsoever for that argument.

On its face, *see* Br. of Appellant, at 23, Chapter 20 adopts substantive limitations on the size of amercements without regard to the identity of the beneficiary of the extraction. In addition, amercements were, as an historical fact, paid to officials other than the Crown. *See* Br. of Aetna, at 16 n.26 & 17 n.27. Furthermore, the central point of Chapter 20 was to remove the *arbitrary* element in the exaction of amercements by requiring the Crown to "conform to its own customary rules." W. McKechnie, *Magna Carta* 287 (2d ed. 1958). *See generally* Br. of Aetna, at 15. This objective was, in practice, achieved through the articulation of substantive standards and the imposition of procedural regularity on the amercements system. This objective was also pursued by those who drafted the prohibition on excessive fines as it appeared in the Declaration of Rights of 1689, subsequently enacted later that year by Parliament as the English Bill of Rights. Those drafters "wanted to prohibit punishments that were unauthorized by statute . . . ." L. Schwoerer, *The Declaration of Rights,*

1689, 93-94 (1981). Appellee cites *no* evidence to the contrary.

Appellee also argues that English constitutional limits on excessive penalties would have been regarded as inapplicable to 20th-Century punitive damage awards because in some cases English courts in the 18th Century perceived themselves to be without authority to set aside disproportionate "exemplary damage" awards. Br. of Appellee, at 33-35. Appellee's argument, however, totally fails to address the fact that the three cases upon which he relies[8] either involved misconduct by government officials, who did not enjoy the protection of the Amercements Clauses, *see* E. Coke, *The Second Part of the Institutes of the Laws of England* 27 (6th ed. 1681); Br. of Appellant, at 29, or involved "exemplary damage" awards which were perceived to be compensatory as well as punitive. *Id.*, at 28-30.

As appellant has demonstrated, *id.*, the blending of the reparative and retributive rationales by English courts in the 18th Century to justify the affirmance of the earliest "exemplary damage" awards explains in part why the defendants in those cases may not have invoked the principle of proportionality in Magna Carta and the Excessive Fines Clause of the English Bill of Rights. It was not until the middle of the 19th Century that punitive damages in their more purely punitive form—imposed, like amercements and fines, for the purposes of punishment and deterrence—began to emerge "as 'a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine.' " W. Hale, *Handbook on the Law of Damages* 303 (2d ed. 1912). At that point, the reparative and retributive purposes of the law continued to be joined in

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[8] *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763); *Grey* v. *Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764); *Benson* v. *Bart*, 3 Burr. 1846, 97 Eng. Rep. 1130 (1766).

civil actions, but the function of punitive or exemplary damages was finally recognized as purely punitive.

The best indication of the meaning and intended reach of the Excessive Fines Clause is not, as appellee would have it, a few English cases from the mid-18th Century before "exemplary damages" had taken on the exclusively punitive and deterrent role they now perform. Rather, the understanding of the Colonists and Framers of the Eighth Amendment who, as history shows, fully intended to protect themselves from disproportionate, excessive punishment, is the better source from which to derive the meaning of the Excessive Fines Clause.

The distinctions between "amercement" and "fine" had become blurred as early as the 15th Century. Br. of Aetna, at 18 n.29. As documented by *amici curiae*, the Colonists also used the terms amercement and fine interchangeably in the fundamental Colonial documents, some of which expressly incorporated Chapter 20 of Magna Carta. Br. of Aetna, at 20-25. Those materials demonstrate the understanding of the Colonists that Chapter 20 was applicable to fines imposed in civil as well as criminal cases, *id.*, at 23,[9] and was applicable to fines payable directly to a pri-

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[9] The understanding of the Colonists regarding the applicability of Chapter 20 and the prohibition on excessive fines in the English Bill of Rights of 1689 to civil cases mirrors the understanding of the committees of the Convention which drafted Article 10 of the Declaration of Rights in early 1689 and the Members of Parliament who enacted the Declaration as the Bill of Rights later that year. Professor Massey, after a thorough exposition of the relevant historical materials, concludes that the prohibition on excessive fines in Article 10 of the Declaration "should be read as prohibiting excessive fines and amercements, whether imposed by judge or jury, in both civil and criminal proceedings." Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1256 (Nov. 1987) (to be published).

An examination of the briefs before the Court in *Ingraham* v. *Wright*, 430 U.S. 651 (1977), demonstrates that the primary historical materials

vate litigant, *id.*, at 21. Like the drafters of the English Bill of Rights, the Colonists, including the Framers of the Eighth Amendment, were concerned about excessive governmentally imposed punishments, not the particular form in which such punishments were administered. The suggestion that the Colonists would have been indifferent to excessive governmentally imposed financial sanctions merely because they were paid to randomly selected citizens rather than to the government's treasury defies common sense and is not supported by any historical evidence.[10]

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relied on by appellant, *amici curiae* Aetna, *et al.*, and Professor Massey were not placed before this Court by the litigants in *Ingraham*. This lack of full development of the historical background of the framing of the English Bill of Rights may well have been responsible for the Court's suggestion in *Ingraham* that the Eighth Amendment applies only to punishment imposed after a criminal trial. As noted at the time, the *Ingraham* Court proffered this suggestion based upon a "vague and inconclusive recitation of the history of the [Eighth] Amendment." 430 U.S., at 685 (White, J., dissenting).

Moreover, in *Ingraham* the Court's opinion observed that, as an historical fact, the use of moderate corporal punishment by a teacher to correct a student in his care was viewed as "lawful," 430 U.S., at 661, by Blackstone. In sharp contrast, the exaction of excessive amercements (and, later, fines) has been violative of English law since at least 1215. Thus, while English history arguably supported the result reached in *Ingraham*, it did not support the breadth of some of the Court's language. As Professor Massey's research establishes, the elimination of the reference to "criminal cases" from an early draft of Article 10 of the Declaration should, in light of the contemporary events, be regarded as reflecting the understanding of the drafters that the prohibitions on excessive fines, bail and punishments were not limited to criminal cases. 40 Vand. L. Rev., at 1254-56.

[10] Appellee suggests, without elaboration, that the Court should hold the Excessive Fines Clause inapplicable to the States, Br. of Appellee, at 29 & n.43, and that corporations are not entitled to its protection, *id.* & n.44. Neither suggestion has merit. In *Robinson* v. *California*, 370 U.S. 660 (1962), the Court first held the Cruel and Unusual Punishments Clause applicable to the States through the Due Process Clause of the Fourteenth Amendment. The Excessive Bail Clause has also been held applicable to the States through the Due Process Clause. *See, e.g.*,

C. The Appropriate Measure of Constitutional Excessiveness

Appellee appears to agree that Chapter 20 of Magna Carta required amercements to be proportional to the seriousness of the conduct for which the amercement was imposed. Br. of Appellee, at 32. Appellee nevertheless argues that there is no historical support for appellant's position that the constitutional excessiveness of punitive damage awards should be measured, *at least in part*, by comparing the magnitude of such awards to civil and criminal penalties established prospectively by legislatures and made generally applicable to all citizens as the appropriate financial sanctions for comparable conduct. Br. of Appellee, at 37-41.

Appellee's explanation of his position confuses, perhaps unintentionally, two separate questions. As noted in the foregoing paragraph, the initial question regards the substantive standards imposed on the excessiveness of punitive awards by Chapter 20; on this question the parties generally agree. The second, and more important, question revolves around how English courts avoided the imposition of amercements which were disproportionate to the offense

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United States ex rel. Siegal v. *Follette*, 290 F. Supp. 632, 634-35 & nn.11-13 (S.D.N.Y. 1968).

The applicability of the Excessive Fines Clause to corporate entities is controlled by the opinion of Justice Field, writing for a unanimous Court in *Minneapolis and St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889), in which the Court reasoned "that corporations can invoke the benefits of provisions of the Constitution . . . which guarantee to persons the enjoyment of property . . . ." Moreover, at least since the enactment of the Statute of Westminster, 3 Edw.I, Ch. 6, in 1275, the protections of Magna Carta were extended to corporate and political entities. E. Coke, *The Second Part of the Institutes of the Laws of England* 27, 169-70 (6th ed. 1681). Thus, the Framers of the Eighth Amendment would have understood the Excessive Fines Clause to be applicable to corporate entities.

involved in a particular case. That latter question involves an inquiry into both substance and process.

1. *The Substantive Inquiry Into Excessiveness*

Contrary to appellee's submission, there is no doubt that limits on amercements and fines, both before and after Magna Carta, were frequently established by local customs, rules and the equivalent of statues.[11] *See* J. Holt, *Magna Carta* 50, 230-32 (1965) (cited for this specific point in Br. of Appellant, at 37). There was in fact a recognized scale of maximum amercements established in the first year of Henry VI, W. McKechnie, *supra*, at 298, and statutes also established specific limits. F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 361 (1948). This history demonstrates that in implementing Chapter 20, the English rejected the proposition that juries were competent to make the threshold determination regarding the maximum punishment which was "proportional" to the particular offense involved. In fact, the English settled on a degree of certainty that parallels the process suggested by appellant's submission to this Court on this point.[12]

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[11] Appellee asserts, Br. of Appellee, at 37-38, that amercements were not required to be proportional to punishments imposed by "Parliament." That assertion is contrary to *Earl of Devon's Case*, 11 State Tr. 1354 (1689), as discussed in appellant's opening brief, at 38-39.

[12] Appellant's proposed test of constitutional excessiveness implies none of the inflexibility that appellee suggests. *See* Br. of Appellee, at 28-29 (treble damages would *per se* violate Excessive Fines Clause). Appellant has not argued that a punitive award is invariably excessive in the constitutional sense merely because it may be greater than any particular legislatively imposed analog. Such enactments are, however, valuable benchmarks which permit an objective inquiry into excessiveness and which will produce consistent, easily administered application of the Excessive Fines Clause. Furthermore, if Mississippi had legislated a treble damage standard for insurance bad faith cases, that standard would, standing alone, reduce the punitive award in this case by $1,560,000.

2. *The Procedure Utilized to Inquire Into Excessiveness and the "Workability" of Appellant's Test for Excessiveness*

Appellee attempts to convince the Court that English juries "had unlimited discretion to determine the appropriate amount" a person should be amerced, Br. of Appellee, at 38, while simultaneously arguing that appellant's submission would require judges "to make substantive and policy judgments they are ill-equipped to make." *Id.*, at 41. The extreme tension between these two positions is self-evident. Appellee would leave within the unfettered discretion of juries the administration of an *ad hoc* system of punishment which cannot, for reasons appellee fails to articulate, be entrusted to judges guided by legislative enactments which presumptively reflect the values of society as a whole, expressed prospectively, regarding standards of conduct and penalties for deviation therefrom. Appellee's system, however, is not the system developed in England and transplanted here.

The function of English juries within the amercements system was to *reduce* an amercement which a court, often guided by rule, custom or statute, had already determined to be proportional to the particular offense involved. Br. of Aetna, at 11-14 *and authorities cited*; Br. of Appellant, 36-39. Appellee eschews responding to this well-documented argument, apparently content to stand on the proposition that reliance on judges and legislative standards in determining the maximum punitive damage award permissible in a particular case is "doomed to failure." Br. of Appellee, at 43.

The First Circuit, however, has recently recognized the arbitrariness of committing to juries the power to award unlimited punitive damages. *Rowlett* v. *Anheuser-Busch, Inc.* No. 87-1021 (1st Cir. Sept. 30, 1987). In the course of reducing a $3,000,000 punitive damage award to $300,000, that court imposed a prophylactic rule under

which trial courts were directed henceforth to establish a limit on the amount of punitive damages which could be awarded and so to instruct the jury, which would be permitted to award less, but not more, than that judicially ascertained limit. Slip op., at 33. Fashioned as a matter of statutory interpretation rather than constitutional imperative, the First Circuit's approach is both "workable" and implicitly adopts one of the key principles recognized and implemented in the antecedents of the Excessive Fines Clause: punishment administered in arbitrary, purely visceral amounts by juries is fundamentally inconsistent with our constitutional system.

III

THE COURT BELOW CHANGED THE RULES IN VIOLATION OF THE CONTRACT AND DUE PROCESS CLAUSES

Appellee argues that the Court below did not "change [the] law in any respect." Br. of Appellee, at 47. However, prior to the decision in this case the court below had never, in a bad faith case, determined that insurers would be liable for punitive damages when they had an arguable basis for denying a claim but communicated an improper basis to their insureds. As stated unequivocally by the court below:

> The issue is not the defense which Bankers Life at trial finally settled upon to defend the suit, but the reason it gave Crenshaw for denying the claim.

J. S. App., 40a, 483 So.2d, at 283. To support this proposition, the court below relied not on its prior cases but, rather, the then-recent decision of the Supreme Court of Alabama in *Aetna Life Insurance Co.* v. *Lavoie*, 470 So.2d 1060 (Ala. 1984), *vacated*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986).

Having framed the "issue" in this manner, the majority of the court below affirmed a punitive damage award for

conduct held to be inconsistent with vague and uncertain standards which have not even been susceptible to clear articulation in general terms by the court below. *Compare* the majority opinion below, J. S. App., 40a-47a, 483 So.2d, at 173-76 (appellant not entitled to rely on expert opinion of Medical Director), *with* dissenting opinion, J. S. App. 64a-68a, 78a-80a, 483 So.2d, at 284-85, 290-91 (appellant justified in relying on expert opinion of Medical Director) *and Blue Cross and Blue Shield of Mississippi, Inc.* v. *Campbell*, 466 So.2d 833 (Miss. 1984) (insurer entitled to rely on expert opinion of registered nurse).

Furthermore, if the imposition of a $230.95 fine for conduct found to be "reprehensible in some respect" is violative of the Due Process Clause, *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403-04 (1966), then due process must surely be violated by the imposition of a $1,600,000 fine based on the elusive definitions of misconduct in this case presented to the jury[13] and articulated by the court below.

IV

MISSISSIPPI'S APPEAL PENALTY STATUTE ARBITRARILY BURDENS THE RIGHT TO APPEAL

A. Standard of Review

Relying on a passage from this Court's opinion in *Lindsey* v. *Normet*, 405 U.S. 56, 73 (1972), which is irrelevant to the showing which must be made to justify a State's burdening of the right to appeal, appellee defends § 11-3-23 without acknowledging the burden he carries under *Lindsey*. Br. of Appellee, at 12. As *Lindsey* held, the exercise of the statutory right to appeal "cannot be granted

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[13] As noted above, note 1, *supra*, the six jury instructions on punitive damages, reprinted in the Appendix, *infra*, 1a-7a, taken collectively, provided the jury the opportunity to impose punitive damages on the basis of virtually meaningless standards and in a virtually unlimited sum.

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to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S., at 77.

B. The Arbitrary Classifications Drawn by § 11-3-23

Based on his mischaracterization of the applicable standard of review dictated by *Lindsey*, appellee argues that the arbitrary overinclusiveness and underinclusiveness of § 11-3-23 are essentially irrelevant to a determination of the constitutional issue. Br. of Appellee, at 16-17. This assertion is flatly inconsistent with *Lindsey*, in which the Court held that the statute at issue was unconstitutional because it at once barred nonfrivolous appeals and allowed "meritless appeals" to go unpunished. 405 U.S., at 78. Section 11-3-23 also fails to punish certain frivolous appeals and cross-appeals, yet imposes a substantial penalty (here, $240,000) on an appellant, as here, who brings an appeal which fails by a single vote in the highest court of a state after three years of deliberation.

Appellee also theorizes that the windfall received by successful appellees may bear some relationship to "intangible costs that cannot be precisely measured, such as the emotional toll of participating in litigation . . . ." Br. of Appellee, at 15. But this suggestion merely obscures the fundamental defect in § 11-3-23. If Mississippi desires to reimburse litigants for such "intangible costs" in connection with appeals pursued within its appellate system, Mississippi is required to place all litigants who experience such "intangible costs" on an equal footing. Section 11-3-23 makes no pretense of doing so.

C. *Lindsey* v. *Normet* Is Indistinguishable

Although appellee generally ignores the pertinent aspects of *Lindsey*, his muted attempt, Br. of Appellee, at 19-20 n.26, to distinguish *Lindsey* is without merit. He argues that *Lindsey* involved "poor tenants." Yet, as the *Lindsey* Court expressly held, the statute imposed on a "nonindigent . . . appellant . . . a substantial barrier to

appeal faced by no other civil litigant . . . ." 405 U.S., at 79.[14]

Appellee also argues that the burden on appellants under that statute "doubled the stakes," while § 11-3-23 only raises the stakes by fifteen percent. The Court's concern in *Lindsey*, however, was not with the fact that the stakes were doubled but, rather, was with the fact that the windfall recovery by the landlord was "unrelated to actual rent accrued or to specific damage sustained by the landlord." *Id.*, at 77. Section 11-3-23 results in an indistinguishable "windfall" to successful appellees.

Finally, appellee contends that the double-bond requirement struck down in *Lindsey* "applied only to a very small class of litigants." But nothing in the Court's opinion in *Lindsey* suggests that the Court would have sustained the statute if its arbitrary exactions had been extended to other classes of litigants on the same unequal basis. Contrary to appellee's suggestion, Mississippi now stands virtually alone among the States in imposing arbitrary penalties on unsuccessful appellants.[15] Even Mississippi has now adopted a rational substitute for § 11-3-23.[16]

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[14] This observation by the Court disposes of appellee's argument, Br. of Appellee, at 11 n.9, that appellant has no "standing" to challenge § 11-3-23 by laying before the Court all of the arbitrary classifications drawn by § 11-3-23.

[15] Appellee acknowledges that only the States of Alabama, Kentucky and Virginia have enacted statutes under which mandatory penalties are imposed on unsuccessful money-judgment appellants. Br. of Appellee, at 19 & n.24. Alabama repealed its statute on a prospective basis effective June 11, 1987. 1987 Ala. Acts 188. The Kentucky statute imposes a penalty only on the second appeal of a case, *Ash* v. *Security National Insurance Co.*, 574 S.W.2d 346, 350-51 (Ky. 1978), while Virginia's statute is applied in very narrow circumstances. *Nationwide Mutual Ins. Co.* v. *Tuttle*, 155 S.E.2d 358, 362 (Va. 1967).

[16] On June 15, 1987, the court below promulgated new Rule 38 under which, "if this Court shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee."

V

CONCLUSION

This case concerns the question whether excessive, disproportionate punishment may be inflicted by the government notwithstanding an ancient and clear constitutional prohibition. Today's punitive damage system is, if anything, worse than the arbitrary fines which Magna Carta and the English Bill of Rights were adopted to control, because the present system is even more arbitrary, standardless, capricious and destructive. The $1,600,000 punitive fine at issue must be vacated and the Mississippi courts directed to reduce it according to the principles of Magna Carta and the English Bill of Rights as carried over in the Eighth Amendment.

November 20, 1987

Respectfully submitted,

*Theodore B. Olson
Larry L. Simms
Terence P. Ross

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500
Attorneys for Appellant
**Counsel of Record*

Of Counsel:

Charles G. Copeland
J. Tucker Mitchell

COPELAND, COOK, TAYLOR & BUSH
Post Office Box 2132
Jackson, Mississippi 39225-2532
(601) 354-0123

This rule was made applicable, as of January 1, 1988, only to civil cases in which § 11-3-23 "does not apply."

APPENDIX

INSTRUCTION NO. P-6—GIVEN—Filed November 30, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

INSTRUCTION NO. P-6

The Court instructs the Jury that an insurance is obligated to deal fairly and in good faith with its insured in handling and processing an insured's claim and to refrain from abuse, gross negligence, malice, fraudulent or outrageous conduct in the handling of its insured's claim.

If you find from a preponderance of the evidence in this case that the Plaintiff filed a legitimate claim with the Defendant for the loss of his foot and that the Defendant subsequently denied and refused to pay said claim, and if you further find that such refusal was attended by abuse, gross negligence, malice, fraudulent, or outrageous conduct, then it is your sworn duty to return a verdict for the Plaintiff and in doing so, you may award both compensatory and punitive damages.

INSTRUCTION NO. P-9A—GIVEN—Filed December 3, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW — PLAINTIFF
VERSUS — NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY — DEFENDANT

INSTRUCTION NO. P-9A

The Court instructs the jury that an insurance company and its employees, in doing the various acts required to make effective an insurance policy, owes a duty to its insureds to act in good faith in handling claims presented by its insureds. Such a relationship is a position of trust and confidence and it demands that the insurance company through its employees deal fairly and exercise good faith in administering the insurance coverage.

If you find from a preponderance of the evidence in this case that the Defendant, Bankers Life and Casualty Company, through its employees delayed or denied the payment of policy benefits, improperly handled the claim, and that such conduct amounted to a breach of the duty to deal fairly and in good faith with its insured, Lloyd M. Crenshaw, under the contract of insurance amounting to an independent tort as more fully set out in Instruction P-19A, then you may award punitive damages against the Defendant, Bankers Life and Casualty Company.

INSTRUCTION NO. P-12—GIVEN—Filed November 30, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

INSTRUCTION NO. P-12

The Court instructs the Jury that punitive damages may also be awarded against an insurance company when an insurance company refuses to pay a ligitimate claim, and bases its refusal to honor the claim on a reason clearly contrary to the espressed [sic] provisions of its own policy as defined by law. Further, punitive damages may be awarded against an insurance company when an insurance company refuses to pay a legitimate claim and has no legitimate reason or arguable reason for failing to pay such a claim.

The purpose of punitive damages against an insurance company where an insurance company refuses to pay a legitimate claim, for the reasons stated above, is as follows: If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that claimant's maximum recovery could exceed the amount of the claim plus interest, would enable the insurer to pressure an insured to a point of desperation, enabling the insurer to force an inadequate or avoid payment entirely.

If you believe from a preponderance of the evidence, if any, that the insured, Lloyd M. Crenshaw, filed a legitimate claim and that said legitimate claim was refused by the Defendant and that the basis for the refusal to honor the claim was for reasons clearly contrary to the provisions

[1127] of the policy, as defined by law or for no legitimate or arguable reason, then it is your sworn duty to assess punitive damages against the Defendant.

INSTRUCTION NO. P-6—GIVEN—Filed December 3, 1981

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

INSTRUCTION NO. P-19A

The Court instructs the Jury that an insurer is obligated to deal in good faith and fairly with its insureds in handling their claims, and to refrain from abuse, gross negligence, malice or fraudulent conduct.

If the handling of an insured's claim is attended by abuse, gross negligence, malice or fraudulent conduct, an independent tort (wrong) may arise, separate from breach of contract, for which punitive damages are recoverable.

Punitive damages are not awarded to compensate the injured party but are allowed in addition to compensatory damages. Punitive damages are granted, therefore, to punish the wrongdoer as an example, to deter the wrongdoer and others from committing similar offenses in the future, and to reward the injured party for his public service in bringing the wrongdoer to account.

They are never awarded to benefit the injured party, but rather to punish and to compel the wrongdoer to have due and proper regard for the rights of the public.

If you find from a preponderance of the evidence if any that punitive damages are warranted, you may take into account the financial status of the defendant, Bankers Life and Casualty Company.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW	PLAINTIFF
VERSUS	NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY	DEFENDANT

JURY INSTRUCTION NO. D-1

The Court instructs the Jury that if you believe from a preponderance of the believable evidence in this case that Bankers Life and Casualty Company had a legitimate or an arguable reason for refusing to pay the claim made by Lloyd M. Crenshaw, then you may not return a verdict for him which includes punitive damages.

The Court instructs you that any award of punitive damages to Lloyd M. Crenshaw must be based on a finding, from a preponderance of the believable evidence in this case, that at the time Bankers Life and Casualty Company denied Lloyd M. Crenshaw's claim, it did not have a legitimate or arguable reason for doing so and that, in denying the claim, Bankers Life and Casualty Company was guilty of such gross and wanton misconduct as to amount to an independent wrong against Lloyd M. Crenshaw.

INSTRUCTIONS
GIVEN
Filed 3rd day Dec 1981
JOE W. MARTIN JR., Clerk
By G. Jones, D.C.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

LLOYD M. CRENSHAW — PLAINTIFF
VERSUS — NO. 11,292
BANKERS LIFE AND CASUALTY COMPANY — DEFENDANT

JURY INSTRUCTION NO. D-7

The Court instructs the Jury that if you believe from a preponderance of the believable evidence presented in this case that the basis of the Defendant's denial of Lloyd M. Crenshaw's claim for benefits was based upon a reasonable medical opinion, that Lloyd M. Crenshaw's alleged accident to his foot had no medical correlation to the surgery performed, then you must find that the Defendant had an arguable basis for the denial of benefits and you further cannot hold the Defendant accountable for punitive damage, even though you might ultimately find Lloyd M. Crenshaw to be entitled to the full policy benefits.

INSTRUCTIONS
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Supreme Court, U.S.
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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

APPELLANT'S RESPONSE TO APPELLEE'S CONDITIONAL MOTION FOR LEAVE TO FILE BRIEF AFTER ARGUMENT

*THEODORE B. OLSON
LARRY L. SIMMS
TERENCE P. ROSS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Attorneys for Appellant

**Counsel of Record*

Of Counsel:

CHARLES G. COPELAND
J. TUCKER MITCHELL

COPELAND, COOK, TAYLOR
& BUSH
Post Office Box 2132
Jackson, Mississippi 39225
(601) 354-0123

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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On direct appeal to the Supreme Court of Mississippi, appellant squarely invoked the Due Process Clause of the Fourteenth Amendment in support of its argument that "[t]he threat of unrestricted punitive damage awards . . . has a substantial 'chilling effect' [and that] [t]his threat of unlimited punishment constitutes an oppressive influence on an insurer's decision whether to contest any claim." J.S. App., 135a. Due process challenges to the unlimited discretion of the jury in determining the magnitude of the punitive damage award were reiterated in the rehearing petition and supporting brief. J.S. App., 138-39, 150-51a. In its opening brief in this Court, appellant made quite clear that the heart of its federal constitutional claim arose

from the anomaly "under which appellant had the worst of both worlds—civil process and exposure to a potentially unlimited fine . . . ." Br. of Appellant, at 15. As appellant argued, "the maximum amounts in which punitive damages may be assessed . . . are . . . not circumscribed by . . . meaningful legislative judgments." *Id.*, at 12. In that brief, appellant also argued at length, *id.*, at 36-39, that the historical antecedent of punitive damage awards in the English system—amercements—were determined by the peers of the persons to be amerced *only* after a maximum potential amercement had been established by the English courts:

> The function of these peers was not, as was true of the jury in this case, to set the maximum possible punishment and then to impose it based upon . . . their unbridled emotions . . . ."

Br. of Appellant, at 37.

In his merits brief, appellee purported to respond to the foregoing argument by asserting that the "excessiveness" of amercements "was not measured by reference to legislatively fixed momentary judgments," Br. of Appellee, at 37, and by asserting that these same English juries "had unlimited discretion to determine the appropriate amount of the amercement . . . ." *Id.*, at 38.[1] In reply to this argument made by appellee, appellant brought additional authorities to the attention of this Court and reiterated its position that "punishment administered in arbitrary, purely visceral amounts by juries is fundamentally inconsistent with our constitutional system." Reply

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[1] In his brief, appellee characterized appellant's argument as an attempt to establish that the maximum size of amercements was "legislatively fixed." Br. of Appellee, at 39. Appellant's point, however, was broader, encompassing the proposition that English judges established "caps" on these punitive awards in advance, whether by reference to the equivalent of legislative judgments or by reference to "local rules or customs . . . ." Br. of Appellant, at 37.

Br. of Appellant, at 16. Appellant's position in its Reply Brief is substantively indistinguishable from its federal challenge to this award which was expressly grounded in the Due Process Clause of the Fourteenth Amendment on direct appeal of this case to the Supreme Court of Mississippi.

Despite the foregoing, appellee now asserts in his motion either that appellant has never raised a federal constitutional challenge to the power of juries to award punitive damages in unlimited sums or, apparently in the alternative, that that argument has been "abandoned" by appellant. To the contrary, and as any fair reading of the merits briefs filed in this case by the parties demonstrates, appellant pressed this federal challenge in the Supreme Court of Mississippi and in this Court *and* this challenge has been fully briefed and argued to this Court. Moreover, this question is subsumed within appellant's Eighth Amendment challenge to this punitive damage award. It was fully briefed and argued as an aspect of the Eighth Amendment challenge, and this Court may proceed to decide it without further briefing.

In essence, appellee's motion is nothing more than an attempt to convince the Court that there is some distinction to be drawn between resolution of the constitutionality of the punitive damage award in this case under the Excessive Fines Clause or directly under the Due Process Clause of the Fourteenth Amendment. Appellant did not understand the Court's questions to suggest such a distinction,[2] which would in any event be one of form, not substance. Appellee's motion should be denied.

---

[2] Appellant understood the Court's questioning as an attempt to identify the narrowest possible basis upon which to ground the potential reversal of the punitive damage award. If appellant is correct, that question is one for the Court to resolve and is of only indirect interest to the parties to this case.

December 3, 1987

Respectfully submitted,

*THEODORE B. OLSON
LARRY L. SIMMS

GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
Telephone: (202) 955-8500

**Counsel of Record*

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On Appeal from the Supreme Court of Mississippi

BRIEF FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT

Of Counsel:
JACK H. BLAINE
Vice President, State Relations, and General Counsel
PHILLIP E. STANO
Senior Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2559
(202) 624-2183

JOE W. PEEL
Vice President and General Counsel
JOHN P. DINEEN
Associate General Counsel
HEALTH INSURANCE ASSOCIATION OF AMERICA
1025 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-7780

ERWIN N. GRISWOLD
(Counsel of Record)
PATRICIA A. DUNN
SARAH W. PAYNE
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939
Counsel for Amici

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1765

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF FOR AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT

INTERESTS OF THE AMICI [1]

The American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, representing the interests of 635 member life insurance companies, including most of the major life insurers in the country. The Council's members currently hold ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The Health Insurance Association of America ("HIAA") represents the interests of 340 member companies which write over eighty-five percent of the health insurance written by insurance companies in the United States. The combined memberships of the HIAA

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[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

and the Council represent over ninety percent of the health insurance written by insurance companies in the United States.

Because the decision below creates the possibility that the nonpayment of an insurance claim may be accompanied by an unpredictable, though substantial, punitive award, the stability of the insurance industry is seriously threatened. Faced with large and unpredictable punitive awards—awards not anticipated in the contractual scheme of the insurer-insured relationship—members of the Council and the HIAA may be unable to provide affordable insurance policies. The Council and the HIAA thus have a direct and immediate interest in the issues presented in this case.

STATEMENT

Appellee Crenshaw was an insured beneficiary under a group accident insurance policy issued to his employer by Appellant Bankers Life and Casualty Company ("Bankers"). The policy—an "accident only" policy—provided coverage for losses "effected *solely* through an *accidental bodily injury* to the insured person." Jurisdictional Statement, 12a (emphasis added). As written, it covered, e.g., an *accidental* loss of limb.

On January 6, 1979, Crenshaw visited the emergency room of Kessler Air Force Base Hospital complaining of foot pains which he subsequently attributed to dropping of an automobile alternator on his foot. He was given medication and told to stay off his foot. He visited, and was released from, the emergency room of Kessler Air Force Base Hospital several additional times between January 9, and January 12, 1979. Although no clinical tests were run after the first of these visits, Crenshaw's injury was diagnosed as "ligamentous injury metatarsal right foot." Jurisdictional Statement, 4a. He received only minor treatment, including the application of a splint and the administration of pain medication.

On January 14, 1979, Crenshaw again returned to the hospital. This time, he was admitted as a patient. After his condition worsened and efforts to treat his foot failed, doctors amputated his leg six inches below the knee. The report of the attending surgeon and the pathologist concluded that Crenshaw had "severe arteriosclerosis of the arteries" in the right foot and lower leg. Jurisdictional Statement, 8a.

In June 1979, Crenshaw filed a claim with Bankers for the loss of his lower leg. As part of the claim investigation, Bankers requested a Board-certified vascular surgeon whom Bankers employed as a medical director to review the medical records which Crenshaw presented. He concluded—and advised Bankers—that "trauma had nothing to do with the limb loss" and that the loss resulted instead from Crenshaw's pre-existing arteriosclerosis. 483 So. 2d 254, 273 (Miss. 1985). Although Bankers' procedures normally would have involved additional investigation of the claim, the surgeon advised Bankers that the medical records provided by Crenshaw were sufficient to arrive at a medical judgment. Accordingly, on June 11, 1979, Bankers denied Crenshaw's claim, relying on the surgeon's opinion that the amputation was not caused by any "accidental" injury to Crenshaw's foot.

The Proceedings Below

Crenshaw instituted this suit in Jackson County Circuit Court on November 10, 1980. He initially requested $20,000 in compensatory damages and $400,000 in punitive damages for Bankers' alleged bad faith refusal to pay his insurance claim. On the eve of trial in December 1981, Crenshaw amended his complaint to seek $1,635,000 in punitive damages.

At trial, Crenshaw's treating physician testified that trauma contributed to the loss of his leg. Because Bankers presented evidence to the contrary—that arteriosclerosis was the sole cause of the loss—the trial court

declined Crenshaw's request for a peremptory instruction on Bankers' contractual liability. Despite the trial court's implicit conclusion that Bankers had at least an arguable basis for its coverage position, it nonetheless instructed the jury on punitive damages. The jury then found for Crenshaw, awarding him $20,000 in compensatory damages and $1.6 million in punitive damages. The jury reached its conclusion after hearing evidence that Bankers had net assets of $294 million in 1980.

On appeal, the Mississippi Supreme Court affirmed the trial court's judgment.[2] As to the punitive damages award, the court below acknowledged Mississippi precedents that an insurer's demonstration of an "arguable basis" for denying coverage generally precludes submission of a punitive damages claim to the jury. *See Reserve Life Insurance Co. v. McGee*, 444 So.2d 803 (Miss. 1983); *Blue Cross & Blue Shield of Mississippi v. Campbell*, 466 So.2d 833 (Miss. 1985). The court nevertheless sustained the trial court's submission of Crenshaw's punitive damages claim to the jury. It found punitive damages to be appropriate where, as it found in this case, "the carrier offers *no justifiable reason or arguable basis* under Mississippi law for denying a valid claim." 483 So.2d at 271 (emphasis added). Accordingly, the court below upheld the punitive damages award.

Three justices dissented, stating that "the majority en route to affirmance has wholly departed from [Mississippi's] general substantive rules regarding the assessment of punitive damages." 483 So.2d at 296. They reasoned, *inter alia*, that under Mississippi law, Bankers' good

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[2] The Court added a fifteen percent penalty ($243,000) to Crenshaw's award pursuant to a Mississippi statute requiring such assessments against unsuccessful defendant-appellants. *See* Miss. Code Ann. § 11-3-23 (Supp. 1982).

faith reliance on its medical director's opinion precluded any award of punitive damages, and that the "arguable basis" standard applied by the majority was an inappropriate and unprecedented departure from the punitive damages standard traditionally applied in Mississippi.

As to the amount of the punitive damages award, five justices, focusing principally on the "pecuniary ability or financial worth of the defendant," 483 So.2d at 278, concluded that a punitive damages award should be altered as excessive only when it shocks "the judicial conscience, not the actual conscience of the members of this Court." *Id.* Finding that the "judicial conscience" could not be shocked by a punitive damages award which constituted "less than 1% of the financial net worth of the defendant," it affirmed the award. *Id.*

SUMMARY OF ARGUMENT

I. The award of punitive damages below—more than 80 times the actual damages in a case which did not involve invasion of any basic right or imposition of any severe or continuing injury—was imposed without any coherent substantive standards and without any particular procedural safeguards to ensure that the award was rational, fair, or based upon intelligible standards. This offends both due process and the Eighth Amendment prohibition against excessive fines. It is clear that the award was punishment—and very serious punishment indeed. It is also clear that any criminal defendant faced with a $100 misdemeanor, and any jury charged with imposing it, would have been provided clearer standards and more exacting guidance than that provided to Bankers and the jury below. "Bad faith" and the distinctions between negligence and gross negligence are concepts too blurry to support the huge and unpredictable range of

results available to juries. The result reflected in the verdict below demonstrates all too clearly the imprecision in asking juries to draw such distinctions. A higher standard of proof, and a clearer definition of the predicate conduct, are required, at the very least, to restore a semblance of due process.

II. The award of $1.6 million itself violates the Eighth Amendment as well because it is grossly disproportionate to the offense charged. Punitive damages are civil fines with penal purposes, and, as punishment, the basic Eighth Amendment principle of proportionality should apply to them. This principle, which has been applied since the Magna Carta, is, like other legal principles here, a bulwark against arbitrariness and jury passion. The " 'parallel limitations' on bail, fines, and other punishments," *Solem v. Helm*, 463 U.S. 277, 289 (1983), embodied in the Eighth Amendment should apply to an exaction that operates as a fine. That the jury exacted a fine without the support of either a criminal finding or the limits of a criminal statute should argue for, rather than against, relief.

Although the Eighth Amendment has yet to be applied in a punitive damages case, the time is now ripe. The proliferation of punitive awards, the meaningless standards, and the profligacy of the amounts assessed all demonstrate that there is no rational or reliable jurisprudence to be applied here if the Due Process Clause and the Eighth Amendment are not. Punitive damages become a windfall for the plaintiff, and a random, cruel surprise for defendants. Punitive damages should not continue to enjoy immunity from constitutional scrutiny.

ARGUMENT

I. THE ASSESSMENT OF PUNITIVE DAMAGES IN THIS CASE VIOLATES DUE PROCESS

A. Introduction

As this Court has aptly observed:

> For all its consequence, 'due process' has never been, and perhaps never can be, precisely defined. '[U]nlike some legal rules' . . . due process is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Rather, the phrase expresses the requirement of 'fundamental fairness.'

Lassiter v. Department of Social Services, 452 U.S. 18, 24, *reh'g denied*, 453 U.S. 927 (1981) (citations omitted). The burgeoning development of modern punitive damages law—exemplified by the decision below affirming a $1.6 million award for failure to pay a $20,000 insurance claim—urgently requires application of the standards and fairness doctrines embodied in the Due Process Clause.

Punitive damages are not "a favorite of the law." *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Current practices regarding punitive damages are neither time-honored, nor logically related to traditional legal doctrines. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-46 (1986). Rather, they are an historical anomaly, transported in neo-natal form from eighteenth century England and nurtured by early American courts to compensate—in small amounts—victims of insult torts, such as libel and slander, and similar intangible and otherwise unredressable injuries. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damage Award in Strict Liability*, 18 Forum 377, 380-81 (1983); *Day v. Woodworth*, 13 Howard 363, 371 (1851).

From this small beginning, punitive damages have recently been extended far beyond their origin in insult torts and have been stretched beyond rational limits.[3] Despite a steady growth in the types of injuries, intangible or otherwise, for which courts now provide compensation, recent years have seen an uncontrolled and arbitrary expansion of punitive damages law and an explosive increase in the size and frequency of punitive awards.[4] Large sums have been awarded in other cases against insurance companies by juries who, left unguided, have assessed damages "in a way that can only be called freakish." *Gregg v. Georgia*, 428 U.S. 153, 206, *reh'g denied*, 429 U.S. 875 (1976). Moreover, lower courts have varied unpredictably in their willingness to

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[3] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, n.10.

[4] The best known example is the $1 billion punitive damages award recently upheld against Texaco. *See Texaco, Inc. v. Pennzoil*, —— S.W. 2d ——, 55 U.S.L.W. 2454 (Tex. App. 1987). But results in product liability and mass tort cases illustrate these trends as well. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981) ($125 million punitive award remitted to $3.5 million); *Ford Motor Company v. Stubblefield*, 319 S.E.2d 470 (Ga. App. 1984) ($8 million); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million); *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981) ($5 million), *modified on other grounds*, 670 F.2d 21 (5th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Airco Inc. v. Simmons First National Bank*, 276 Ark. 486, 638 S.W.2d 660 (1982) ($3 million); *Hasson v. Ford Motor Company*, 32 Cal. 3d 388, 185 Cal. Rptr. 654, 650 P.2d 1171 (1982) ($4 million), *cert. dismissed*, 459 U.S. 1190 (1983). Many other comparable awards, and awards in smaller amounts, have proliferated. *See also* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986) (hereinafter "Justice Department Report") at 3 (measured in constant 1984 dollars, the *average* personal injury punitive damage award in Cook County, Illinois rose from $40,000 in 1970-74 to $1,152,174 in 1980-84).

disturb these often exorbitant awards.[5] Since the business of insurance is dependent upon the insurer's ability

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[5] Some awards have not survived judicial scrutiny. *See, e.g., San Jose Production Credit Association v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (court reversed jury award of $500,000 in punitive damages); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 157 Cal. Rptr. 482, 598 P.2d 452 (1979), *appeal dismissed*, 455 U.S. 912 (1980) (jury award of $5 million in punitive damages against insurer for failure to conduct proper investigation of its insured's claim held to be excessive in that award was 40 times larger than the compensatory damages award and represented two and one-half months of the insurer's net income in 1973 as well as more than seven months of its income in 1974).

Many others, however, have been upheld. *See, e.g., Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073 (Ariz. 1987) (affirming a $3.5 million punitive award and a $15,000 compensatory award against insurer); *Downey Savings & Loan Co. v. Ohio Casualty Insurance Co.*, 189 Cal.App.3d 1072, 234 Cal. Rptr. 835 (1987), *pet. for review filed*, April 7, 1987 ($5 million in punitive damages awarded for bad faith denial of $152,983.42 claim); *Flanigan v. Prudential Federal Savings & Loan Ass'n*, 720 P.2d 257 (Mont.), *appeal dismissed*, 107 S.Ct. 564 (1986) (compensatory award of $194,000; punitive award of $1,300,000); *Lavoie v. Aetna Life & Casualty Co.*, 470 So.2d 1060 (Ala. 1984), *rev'd*, 106 S. Ct. 1580 (1986) (state court upheld $3.5 million punitive damages award for alleged bad faith failure to pay a $2,000 insurance claim); *T.D.S. Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520 (11th Cir. 1985) (jury award of $2.1 million in punitive damages against insurer held not to be excessive); *Dempsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million without explaining any basis for the $1.5 million figure it selected); *Frazier v. Metropolitan Life Insurance Co.*, 169 Cal.App.3d 90, 214 Cal. Rptr. 883 (1985) (jury award of $8 million in punitive damages, as remitted to $2 million, overturned upon finding that claim was time-barred); *Moore v. American United Life Insurance Co.*, 150 Cal.App.3d 610, 197 Cal. Rptr. 878 (1984) (court held $2.5 million punitive damages award not to be excessive, even though award was 83 times the amount of compensatory damages); *Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million award of punitive damages for insurer's tortious termination of insurance benefits upheld).

to make careful, exact computations of risks, the expansion of punitive damages in the insurance industry produces particularly pernicious effects.

The uncontrolled expansion in availability of punitive damages, and the explosive growth in the size of the awards, have been widely recognized. Indeed, the Justice Department, a task force of the American College of Trial Lawyers, and the American Bar Association independently have recommended needed reforms in this troublesome area of the law. *See* Justice Department Report (*supra* note 4), at 2 (attributing insurance crisis in part to "the explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as . . . punitive damages"); Report of the Task Force on Litigation Issues of the American College of Trial Lawyers (August 8, 1986); Resolutions of the American Bar Association, approved February, 1987. Such broad-based expressions of concern reflect recognition that punitive damages, as currently awarded, are both unprecedented and so standardless and unfair as to violate due process.

Finally, the Due Process Clause is surely impacted by the fact that punitive damages are taken from the defendant and paid not to the government but to the plaintiff, above and beyond the plaintiff's actual damages. The defendant is mulcted by governmental action in order to give the plaintiff a windfall. This is a clear case of an exercise of governmental power "that takes *property* from A. and gives it to B"—which one of the earliest opinions to issue from this Court cited as a paradigm of action beyond legislative power. *Calder v. Bull*, 3 Dallas 386, 388 (1798) (per Chase, J.; emphasis in original).

B. Punitive Damages Are Penal and, As Such, Require Application of Procedural Safeguards Available in Criminal Trials

"[I]n keeping with . . . cherished tradition, punishment cannot be imposed 'without due process of law.'" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963). Because the purposes and impact of punitive damages are plainly penal, constitutional protections akin to those accorded to criminal defendants should be afforded to defendants in punitive damages actions.

Though nominally civil, punitive damages are functionally penal. *Cf. United States v. Ward*, 448 U.S. 242, 248-49, *reh'g denied*, 448 U.S. 916 (1980) (where penalty is "so punitive either in purpose or effect" as to negate its civil label, it will be treated as penal). Indeed, this Court has so recognized:

> Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrence.'

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48 (1979), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added). *See also Smith v. Wade*, 461 U.S. 30, 58 (Rehnquist, J., dissenting); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Punitive damages further few, if any, goals of the civil law. Rather, they promote the traditional goals of punishment, e.g., retribution and deterrence, which this Court has stated "are not legitimate nonpunitive government objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).[6]

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[6] This Court, and lower courts, have been guided by the list of considerations articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69, in determining whether a law is penal in nature. Assessed under these factors, which are "neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S. at 249, punitive damages can only be deemed penal. While punitive dam-

That the award of $1.6 million on Crenshaw's $20,000 insurance claim was "penal" in a constitutional sense, so as to require enhanced procedural safeguards, is plain. As the court below stated, such an award serves "in the nature *of punishment for wrongdoing*" and to "set an example as to *deter* others from similar behavior." 483 So.2d at 268 (emphasis added).[7] But despite its penal character, the punitive award rendered against Bankers was accompanied by none of the procedural safeguards mandated by due process. Bankers was penalized—and stigmatized—without the protection of a constitutionally-mandated, elevated standard of proof, i.e., "proof beyond

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ages impose no "affirmative disability or restraint," *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168, they typically are imposed upon a showing of "willfulness" or "maliciousness," they are often assessed in amounts greater than criminal actions involving similar conduct, and no alternative purposes—other than punishment and deterrence—can rationally be assigned to them. *See* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986), Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985), and Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 Va. L. Rev. 269 (1983), for careful analyses of the penal nature of punitive damages.

[7] An additional purpose for punitive damages advanced by the court below—to "reward a plaintiff for public service in bringing the wrongdoer to account," 483 So.2d at 268-69—does not vitiate the penal nature of the punitive damages awarded here. First, the primary "public service" provided is deterrence—a penal goal under *Bell v. Wolfish* and *Kennedy v. Mendoza-Martinez*. The only other conceivable public service achieved is stigmatizing the defendant—the distinguishing characteristic of criminal sanctions. Equally important, a civil penalty is punitive, despite the presence of a non-punitive purpose, if the penalty "appears excessive in relation to the alternative purpose assigned [to it]." *Bell v. Wolfish*, 441 U.S. at 537-38, *quoting Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69. Crenshaw received the full value of his contract when he recovered compensatory damages. The only detriment he sustained, in contrast, was the amount of his attorneys' fees. The Mississippi courts could have allowed Crenshaw compensatory damages for those fees, instead of permitting the jury to assess, without regard to the amount of the fees, the excessive punitive award of $1.6 million.

a reasonable doubt"; was accorded none of the benefits of more stringent pleading requirements in criminal cases;[8] and the sanction was not determined in a less prejudicial bifurcated trial, but in the same proceeding during which its liability was decided. *See Rowan v. U.S. Post Office Department*, 397 U.S. 728, 740 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In Re Winship*, 397 U.S. 358 (1970); *Cole v. Arkansas*, 333 U.S. 196 (1948); *cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (enhanced burden of proof is constitutionally required where proceedings threaten one of the parties with a significant stigma). Moreover, unlike criminal defendants who face maximum punishments, Bankers' "punishment" was left to the unbridled—and unlimited—discretion of a jury. Without any of these safeguards of penal liability—e.g., an elevated standard of proof, standards for and limitations on the amount of punitive damages, pre-trial notice of the precise "charges," and bifurcation of punitive damages trials—the carelessness of recent history in punitive damage cases cannot be a substitute for constitutionally required due process.

C. There Are No Adequate Standards for Determining Liability for Punitive Damages

That punitive damages actions, as they now exist, fail to comport with even the simplest notion of due process is further evident from the complete lack of intelligible standards for assessing punitive damages—a deficiency starkly illustrated by the decision below. Indeed, although the court below cited one standard—that punitive damages are recoverable only for "a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong," 483 So.2d at

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[8] Even in civil fraud cases—causes accompanied by stigmatization of the kind the Mississippi courts imposed upon Bankers—the allegations generally must be pleaded with particularity. No doubt this requirement is rooted in an intuitive recognition of what is, and what is not, fair.

269—it also referred to a different test, i.e., whether Bankers failed to offer "a justifiable reason or arguable basis under Mississippi law for denying a valid claim," *id.*, at 271. Both "standards" are constitutionally deficient.

Under the Fifth and Fourteenth Amendments, it is clearly a denial of due process to punish a person who is without culpability. *See Smith v. Wade*, 461 U.S. at 87-88 (Rehnquist J., dissenting) ("It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm . . ."). But punitive damages—often awarded with no showing of intentional culpability—do precisely that. Indeed, the "standards" for imposing these damages, though never carefully defined, have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence. *See* Myers and Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 52 Ins. Counsel J. 212 (April 1984); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So. Cal. L. Rev. 1, 34-37 (1982).[9] Moreover, given the blurred distinctions between these vague and varying standards, such as "gross negligence" and "reckless negligence," no

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[9] As aptly stated by one author:

> Many of the insurance bad faith awards have been greatly excessive and . . . courts and juries have applied significantly different standards when awarding punitive damages in insurance cases than they have in other cases. The rational basis for such widely differing standards is not obvious. From an ethical standpoint, there is little basis to conclude that the type of misconduct typically found in insurance cases regularly deserves vastly greater sanctions than the blatant fraud and misrepresentations often found in other cases.

Sebert, *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. Rev. 1565, 1620 (1986).

real guidance is provided to judges and juries vested with authority to award punitive damages.[10] As a result, judges and juries remain free to "assess punitive damages in wholly unpredictable amounts bearing no relation to the actual harm caused . . . [and] to use their discretion selectively to punish expressions of unpopular views. . . ." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

These difficulties are all too evident in the present case. Requiring little more than a finding of liability on Crenshaw's contract claim, the court below upheld the jury's punitive award after saying that Bankers had shown no "arguable basis under Mississippi law" for denying Crenshaw's claim—a standard recognized by the dissent as a liberalized exception to punitive damages law carved out especially to support bad faith claims against insurance companies. Thus, the court, as well as the jury, plainly confused the state of mind necessary, at the least, to support the punitive award. Moreover, although the court below found that only five Bankers employees, out of a "nationwide accident and health insurance company," were involved in the denial of Crenshaw's claim, and although the court further emphasized that Bankers had proper investigatory procedures in place, it affirmed a massive penalty against Bankers as a whole on the basis of an arguable error that had occurred in day-to-

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[10] The difficulty of distinguishing conduct which is "reckless" as opposed to merely negligent, leads inevitably to inconsistent applications of these standards. As stated by one author:

> Unfortunately, the distinction between recklessness and negligence relates to no clear behavioral standards in the real world . . . . It is truly striking how we have devised a system that is not far from a lottery for deciding such grave matters—with the draw determined not only by the predilections of the presiding judge, but the emotions of the jury sitting in the case.

Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978).

day claims administration. 483 So.2d at 260, 270, 272, 276. It is not clear what Bankers could have done, or should do in the future, to avoid such punishment—except to pay all claims made, promptly and without question. The burden, of course, falls on shareholders, and eventually on policy owners. There is nothing rational or fair about awarding punitive damages in such circumstances.

D. Leaving the Computation of Punitive Damages to the Discretion of the Jury Fails to Satisfy Due Process

The "standards" used for determining the *amount* of punitive damages to be assessed against a defendant are equally deficient. In contrast to criminal sanctions, punitive damages are generally computed without regard to any statutory or common law maximum. Nor is any rational, intelligible, or workable measure of damages provided. The amounts of punitive damages are left to the sole discretion of the jury, guided only by ill-defined factors, including the wealth of the defendant, and "the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 419 U.S. 323, 350 (1974). *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979); *Smith v. Wade*, 461 U.S. 30, 56-65, 92-94 (dissenting opinions of Rehnquist and O'Connor, JJ.).[11]

The present case provides a clear example of unbridled jury discretion. Bankers was penalized by a jury which was guided by no more definite standards than

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[11] The standards upon which courts rely in reviewing jury awards of punitive damages are equally imprecise, requiring judges to inquire generally whether an award reflects the passions or prejudices of the jury. The difficulty of this review, and the lack of guidance to judges, are all too evident from the decisions below, where the trial court concluded that it had no "authority to change the punitive damages" awarded against Bankers. Jurisdictional Statement, 134a.

that its award should serve as punishment and a deterrent and should take into account Bankers' wealth. Swayed by evidence that Bankers' assets came to a total of $294 million, the jury awarded—and the court below affirmed—a $1.6 million punitive award which was apparently plucked out of the air, has not been explained, and bears little, if any, relationship to customary criminal sanctions or to meaningful punishment. These infirmities were enhanced by the automatic and arbitrary imposition, pursuant to Miss. Code Ann. § 11-3-23 (Supp. 1982), of a fifteen percent penalty against Bankers, as an unsuccessful defendant-appellant, in violation of *Lindsey v. Normet*, 405 U.S. 56, 74-80 (1971).

The constitutional infirmities inherent in punitive damages actions should no longer be ignored. In the absence of appropriate limits, clear and rational standards, and proper procedural protections, punitive damages should be eliminated entirely from the field of insurance—an area where they do not belong. (For the need for protection from "unbridled discretion" in another area, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978); *Donovan v. Dewey*, 452 U.S. 594, 599, 600 (1981).) The ultimate responsibility rests with this Court to guard against stealthy encroachments upon constitutional rights by practices which spring from unjustified deviations from proper standards of due process. No clearer example of a stealthy encroachment exists than that which has developed in the field of punitive damages.

II. THE DECISION OF THE SUPREME COURT OF MISSISSIPPI UPHOLDING MASSIVE PUNITIVE DAMAGES SHOULD NOT STAND UNDER THE EIGHTH AMENDMENT

The Eighth Amendment provides protection against arbitrariness and excessiveness in punishment. Focusing upon the result itself, the Eighth Amendment ensures that punishment will not be meted out arbitrarily, or in

excessive amounts wholly disproportionate to the offense. Even assuming that the procedures employed in assessing punitive damage awards comport with due process, the decision below should not survive scrutiny under the Eighth Amendment.

The Eighth Amendment's ban against excessive punishments and its requirement of proportionality are derived from English law. By the thirteenth century, discretionary amercements, often excessive and oppressive, were prevalent in England—so prevalent that three chapters of Magna Carta were devoted to their control.[12] Indeed, Chapter 14 of Magna Carta, setting forth the rule against excessive punishment, provided:

> A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence, and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

J. Holt, *Magna Carta* 323 (1965).[13]

The principle that amercements could not be excessive was reiterated in the English Bill of Rights of 1689, which strove to curb selective and arbitrary application of harsh penalties by incorporating "the longstand-

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[12] The amercement was the equivalent of the modern fine. *See* Granucci, *"Nor Cruel and Unusual Punishment Inflicted": The Original Meaning*, 57 Cal. L.R. 839, 845 (1969). Though the discretionary character of amercements permitted the circumstances of each case to be considered, and the fine fixed accordingly, it invited the opportunity for arbitrary and excessive penalties. *Id.*

[13] Maitland said of this chapter that "very likely there was no clause in the Magna Carta more grateful to the mass of the people." F. Maitland, *Pleas of the Crown for the County of Gloucester XXXIV* (1884), *cited in* Granucci, *supra*, at 845.

ing principle of English law that the punishment . . . should not be . . . greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959). Evidencing the intent of the English Bill of Rights to preclude disproportionate and excessive fines, the House of Lords, "barely three months after the Bill of Rights was adopted, . . . declared that a 'fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna carta, the common right of the subject, and the law of the land." *Solem v. Helm*, 463 U.S. 277, 285 (1983), *quoting Earl of Devon's Case*, 11 State Tr. 133, 136 (1689).

The concept of proportionality which was firmly embedded in English law by 1689 was transplanted to American soil, and ultimately incorporated into the Bill of Rights as the Eighth Amendment. *See Solem v. Helm*, *supra*, 463 U.S. at 285-86. This "constitutional principle of proportionality," *id.* at 286, was recognized by this Court as early as 1910. In *Weems v. United States*, 217 U.S. 349, 367 (1910), the Court held that the Eighth Amendment precluded the punishment of 15 years of imprisonment plus hard labor in chains for the crime of falsifying a public document, noting "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." On repeated occasions since *Weems*, the Court has resorted to the constitutional principle of proportionality to conclude that certain punishments are, or are not, excessive.[14] Most recently, this

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[14] *See Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence held to be disproportionate and excessive for the crime of rape); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation for wartime desertion violated the Eighth Amendment); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty for felony murder held to be excessive under the circumstances).

Court in *Solem* revisited the concept of proportionality in punishments, holding that the Eighth Amendment prohibits a life sentence, without possibility of parole, for the commission of a seventh nonviolent felony.[15]

Although this Court has had little occasion to address the Excessive Fines Clause of the Eighth Amendment, the cases decided under the Cruel and Unusual Punishments Clause provide a useful framework for assessing the validity of punitive damages under the Eighth Amendment—an issue of first impression in this Court. *See Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580, 1589 (1986), where this Court said that the argument that the imposition of massive punitive damages "is impermissible under the Excessive Fines Clause of the Eighth Amendment . . . raise[s] important issues which, in an appropriate setting, must be resolved." In light of the common origin of the clauses of the Eighth Amendment, the concept of proportionality should be equally applicable to all of the clauses of the Amendment. Indeed, as this Court has stated:

> We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, [430 U.S.] at 664,

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[15] In so holding, the Court weighed the gravity of the offense and the harshness of the penalty, and looked to the sentences imposed for similar conduct in the same and other jurisdictions, stating that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* at 291. Applying the considerations enunciated in *Solem* here, a punitive award, 80 times the amount of actual damages, is obviously excessive and grossly disproportionate to the offense of bad faith failure to pay an insurance claim. Moreover, consideration of the fines allowed for violation of the Mississippi Insurance Code, which proscribes unfair or deceptive acts or practices in insurance, removes all doubt that the award here was excessive. Section 83-5-49 of the Mississippi Code provides that a *willful* violation of a cease and desist order proscribing an unfair practice is punishable, at most, by a $1,000 fine. Miss. Code Ann. § 83-5-49.

> and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception.

Solem v. Helm, 463 U.S. at 289.[16]

The governing principle of proportionality as a protection against arbitrariness and excessiveness in punishment should lead to reversal of the award of penalty damages in the amount of $1.6 million against Bankers for the "offense" of declining to pay a $20,000 insurance claim. The award of $1.6 million against Bankers was rendered in a proceeding which failed to comport with due process, and which permitted the jury to award a penalty in the form of punitive damages in an amount which was arbitrary and wholly disproportionate to the offense charged.[17] The complete absence of standards for

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[16] That punitive damages are nominally civil should not bar the application of the Eighth Amendment to them. Not only are punitive damages functionally penal (as their name clearly indicates), but the Eighth Amendment, unlike some other Bill of Rights guarantees, does not distinguish between civil and criminal punishment. *Compare* the Eighth Amendment ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted") *with* the Fifth Amendment (no person can be held to answer "for a capital, or otherwise infamous *crime*" without indictment by a grand jury; no person "shall be compelled *in any criminal case* to be a witness against himself") (emphasis added) and the Sixth Amendment ("[i]n all *criminal* prosecutions") (emphasis added). *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147-51 (1986).

[17] Significantly, this Court, in reviewing the role of the jury in meting out criminal sentences, has emphasized the importance of providing guidance to juries to protect against arbitrary and dis-

assessing punitive damages (an infirmity which would not survive in other criminal contexts) has led inevitably to a proliferation of similar punitive awards—a result which the Eighth Amendment proscribes.

Despite the magnitude of the punitive damages award assessed against Bankers, the court below concluded that it was not excessive, stating that "the judicial conscience could [not] be shocked by a punitive damages assessment which is less than 1% of the financial net worth of the defendant." 483 So.2d at 279. But to call the verdict below anything but excessive rejects the concept of proportionality and gives open-ended indulgence to the sort of jury passion—and, indeed, enthusiasm—that inflates such awards. By upholding an award of $1.6 million in punitive damages—for failure to pay a $20,000 claim after careful consideration—the court below has sanctioned a scheme of punishment which bears no ascertainable or rational relation to the offense charged. Such punishment should not be upheld under the plain words and purposes of the Eighth Amendment.

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criminatory sentences. *See Gregg v. Georgia*, 428 U.S. at 189 ("discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). Although guidance has traditionally been provided to juries assessing punishment in criminal contexts, no similar guidance—or, at least, no useful guidance—has been given by courts to juries vested with the power to assess punitive damages.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Appellant, the decision below should be reversed.

Respectfully submitted,

Of Counsel:
JACK H. BLAINE
Vice President, State Relations, and General Counsel
PHILLIP E. STANO
Senior Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2559
(202) 624-2183

JOE W. PEEL
Vice President and General Counsel
JOHN P. DINEEN
Associate General Counsel
HEALTH INSURANCE ASSOCIATION OF AMERICA
1025 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-7780

ERWIN N. GRISWOLD
(Counsel of Record)
PATRICIA A. DUNN
SARAH W. PAYNE
JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3939
Counsel for Amici

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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From the Supreme Court of Mississippi

BRIEF OF AETNA LIFE INSURANCE COMPANY, GOLDEN RULE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, TRANSAMERICA INSURANCE COMPANY, AND FIREMAN'S FUND INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Of Counsel:

DARRELL S. RICHEY
VICE PRESIDENT AND GENERAL COUNSEL
GOLDEN RULE INSURANCE COMPANY
712 11th Street
Lawrenceville, Ill. 62439

THOMAS J. NORMAN
ALLSTATE INSURANCE COMPANY
4 Allstate Plaza
Northbrook, Illinois 60062

COLIN MCRAE
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
TRANSAMERICA INSURANCE COMPANY
1150 South Olive Street
Los Angeles, California 90015

*GEORGE C. MONTGOMERY
MONTGOMERY, GASCOU, GEMMILL & THORTON
1100 Glendon Avenue, Suite 1800
Los Angeles, California 90024
(213) 879-9115

**Counsel of Record for* Amici Curiae

Of Counsel:

N. DOUGLAS MARTIN, JR.
ASSISTANT VICE PRESIDENT & COUNSEL
FIREMAN'S FUND INSURANCE COMPANY
777 San Marin Drive
Novato, California 94998

QUESTION PRESENTED

Whether the Excessive Fines Clause of the Eighth Amendment, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, applies to control the size of punitive damage awards rendered in civil actions.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1765

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal From the Supreme Court of Mississippi

BRIEF OF AETNA LIFE INSURANCE COMPANY, GOLDEN RULE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, THE OHIO CASUALTY INSURANCE COMPANY, TRANSAMERICA INSURANCE COMPANY, AND FIREMAN'S FUND INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF AMICI*

This case concerns the question whether the Constitution, specifically the Excessive Fines Clause of the Eighth Amendment, is to be applied as a restraint on the size of

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*Pursuant to Rule 36 of the Rules of the Court, letters from counsel of record for each of the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

punitive damage awards which have been made by juries more frequently and in increasingly larger sums over the past decade. In imposing large and completely unpredictable punitive damage awards such as the extravagant award in this case, civil juries function with unfettered discretion to decide whether an insurance company should be punished and to what extent. In authorizing civil juries to perform this role, the states are implementing a system of punitive justice on an *ad hoc* basis, establishing through jury verdicts substantive standards of conduct and levels of punishment which have never been subjected to legislative consideration. The result of this random process is a penal justice system which functions without clear prospective standards. Indeed, the only certainty in this system is that a confiscatory punitive award may be imposed for virtually any mistake made in the processing of an insurance claim.

Amicus Aetna Life Insurance Company first presented to this Court the argument that the Excessive Fines Clause ought to be applied to control the size of punitive damage awards in *Aetna Life Insurance Co. v. Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986). In that case, a narrow majority of the Supreme Court of Alabama had affirmed a judgment of $3.5 million in punitive damages against Aetna for alleged bad faith in the refusal to pay $1,650.22 of a health insurance claim.[1] In *Lavoie*, amicus Golden Rule Insurance Company appeared as amicus in this Court, pointing out that the award against Aetna would have constituted fourteen percent of Golden Rule's entire benefits payments for a recent year. Golden Rule argued to the Court that the lack of meaningful substan-

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[1] On remand from this Court's decision vacating that judgment, the Supreme Court of Alabama ordered the award reduced to $500,000; in so ordering, only a three-justice plurality approved the award of punitive damages. *See Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987).

tive rules of conduct, which results in the imposition of new rules retroactively on insurance companies as each punitive damage award is entered, makes it virtually impossible for a small insurance company to be sure that it can survive.

Amicus Allstate Insurance Company is experiencing first hand the results of uninhibited jury punitive damage verdicts. It is before the California Supreme Court in connection with a $40 million jury verdict in an insurance bad faith case. In addition, on February 26, 1987 the Supreme Court of Arizona reinstated a $3.5 million punitive damage award against Allstate in a bad faith case notwithstanding arguments by Allstate based on this Court's statement in *Aetna Life Insurance Co. v. Lavoie*, slip op. at 13, 106 S. Ct. at 1589, that the applicability of the Excessive Fines and Due Process Clauses to such awards raised "important" questions.[2]

Amicus The Ohio Casualty Insurance Company recently experienced the affirmance of a $5 million punitive damage award in a bad faith case by a California intermediate appellate court. *Downey Savings and Loan Association v. The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (Ct. App. 2d. Dist.), *pet. for rev. denied*, No. S 000553 (Cal. May 27, 1987).

Amici Transamerica Insurance Company and Fireman's Fund Insurance Company are each similarly defendants in cases in which large punitive damages have been sought.

Amici collectively conduct their insurance businesses in all fifty States. Each day they process thousands of insurance claims, and in most jurisdictions each claim processed could result in arbitrary and excessive punishment because of a jury's determination, made at trial years after

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[2] *Fellows v. Allstate Insurance Co.*, No. C 259 993 (Cal. Ct. App. 2d Dist. Dec. 31, 1986), *pet. for rev. granted*, No. S 000007 (Cal. Apr. 2, 1987); *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073 (Ariz. 1987).

the events underlying a lawsuit occurred, that a claim should have been paid. The massive reallocation of society's resources which occurs with each jury's verdict, or with increasingly larger settlements because of the prospect of unlimited punitive damages, raises social and economic issues of signal importance which have, for the most part, not been addressed directly by the bodies capable of doing so—the legislatures of the several States.

Absent the constitutional protection from excessive punitive awards provided by the Excessive Fines Clause, amici are being deprived of rights which have been accorded in England since Magna Carta. If, as the Court stated recently in *Solem v. Helm*, 463 U.S. 277, 285-86 n.10 (1983), the Eighth Amendment provides at least the same "liberties and privileges" available under the lineal antecedents of the Eighth Amendment—including the amercements clauses of Magna Carta—then Bankers Life and amici are also entitled to those liberties and privileges, one of which was freedom from arbitrary and excessive fines.

STATEMENT OF THE CASE

Amici adopt appellant Bankers Life's statement of the case. Only two additional points should be emphasized.

First, the $1,600,000 penalty imposed by the jury in the case below is part of a governmental system of punishments inflicted on an *ad hoc* basis at the instance of private litigants for deviations from vague, judicially pronounced, generalized standards of conduct. This case is not about the liability of a private party for injuries caused by its conduct. It is about governmental punishments. However aberrational in practice, punitive damages/civil fines are part of a government program to affect behavior through selective punishments.

Second, the punitive damage/civil fine system in Mississippi is characterized by the same qualities listed by Black-

stone as the very definition of injustice and inhumanity: disproportionality, uncertainty and arbitrariness. Not unlike the system of corporal punishments eventually abolished in England, punitive damages/civil fines are "[p]unishments of unusual severity, especially when indiscriminately inflicted . . . ." 4 W. Blackstone, *Commentaries on the Laws of England* *16-17 (1768).

SUMMARY OF ARGUMENT

Since the Excessive Fines Clause of the Eighth Amendment was ratified on December 15, 1791, this Court has never had occasion to consider and apply that Clause to an "excessive fine." Thus, this Court has never determined what the Framers of the Bill of Rights intended by the word "fine" or what would constitute an "excessive" fine. This Court's decisions have, however, established two principles which are deeply implicated in this case. The first principle is that clauses of the Eighth Amendment often associated with punishments imposed at the conclusion of criminal proceedings—the Excessive Bail and Cruel and Unusual Punishments Clauses—are applicable to detention or punishment imposed outside of the formal criminal process. *Carlson v. Landon*, 342 U.S. 524 (1952) (bail)); *Trop v. Dulles*, 356 U.S. 86 (1958) (punishment). The second principle is that the Eighth Amendment embodies the concept that punishments must not be disproportionate to the offence, a principle which this Court, in *Solem v. Helm*, *supra*, derived from the amercements clauses of Magna Carta.

In this case, the $1.6 million punitive award at issue was imposed for the sole purpose of punishing Bankers Life rather than compensating appellee. As articulated by the court below, the jury was authorized to impose an award in any size it deemed adequate to exact society's retribution for the conduct allegedly engaged in by Bankers Life and to deter Bankers Life and other similarly situated persons, including amici, from engaging in similar

conduct. Thus, the purposes of this award are to fulfill the historical purposes of the criminal law—punishment and deterrence. *Trop v. Dulles*, 356 U.S. at 96 (Warren, C.J.) (plurality opinion).

Because they are intended to punish and deter, punitive damages are functionally and legally indistinguishable from monetary awards imposed in like circumstances under English common law for more than nine centuries. Monetary awards designed to punish and deter a wrong-doer were known as "wites" in pre-Norman days, "amercements" for about six centuries after the Norman Conquest, and "fines" thereafter. However denominated, these monetary impositions over the centuries came to be controlled in England by legal principles pursuant to which limits on such monetary exactions were ascertained and enforced. Foremost among the documents establishing this system of restraints on the exercise of arbitrary power to inflict monetary punishment were Magna Carta, the amercements clauses of which provided that punitive awards must be proportionate to the offence and imposed only by the early equivalent of a jury, and the English Bill of Rights of 1689, which incorporated Magna Carta's principle of proportionality and from which the language of the Eighth Amendment was lifted virtually verbatim.

In theory and in practice, these restraints on the exercise of power to punish persons for conduct declared to constitute civil wrongs under English common law were implemented in two stages. First, the maximum punitive award was determined according to the equivalent of a statute or by the judge of the court involved based upon the nature of the offence. Then, a group of peers of the wrong-doer determined whether the wrong-doer, based upon his financial circumstances, should pay all, part or none of that fine. What evolved over the centuries was a relatively fixed system of maximum fines which replaced the arbitrary, uncontrolled system that largely existed prior to Magna Carta. The legal systems of Mississippi and many

other States have reinstituted the arbitrary and capricious practices of the period before Magna Carta.

This system of restraints on arbitrary punitive awards was, as observed by this Court in 1983, not a "hollow guarantee[ ]." *Solem v. Helm*, 463 U.S. at 285. The English courts, in reliance on Magna Carta as reconfirmed by successor Kings, as declared to be part of English Common law by the Parliament in 1297, and as enacted into statutory law on numerous occasions by later parliaments, struck down amercements and fines as being excessive. This same principle prohibiting excessive governmental financial penalties was brought to the colonies in the 17th Century, where it was incorporated directly into governing documents, including those of Massachusetts, Pennsylvania and New York, in language taken directly from Magna Carta and, after 1689, in virtually all of the colonies in language lifted directly from either Magna Carta or the English Bill of Rights of 1689.

The rest is familiar territory to the Court. When the Framers of the Bill of Rights in the First Congress considered and proposed the language which is now the Eighth Amendment, they brought to that process a tradition pursuant to which fines and financial penalties, as well as other punishments, had to be proportional. In the Eighth Amendment, they "intended to provide at least the same protection—including the right to be free from excessive punishments," *Solem v. Helm*, 463 U.S. at 286, that their English forebears had enjoyed.

ARGUMENT

I. INTRODUCTION

The Federal Constitution enshrines a "number of fundamental principles derived—immediately or ultimately—from Magna Carta . . . ."[3] This case presents two related

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[3] P. Kurland, "Magna Carta and Constitutionalism in the United States: "The Noble Lie," in *The Great Charter* 57 (1965).

questions concerning one of those principles. The first is whether the Excessive Fines Clause of the Eighth Amendment, derived from Magna Carta's restraints on excessive amercements, is to be applied to control the size of punitive damage awards rendered by state judicial systems in civil cases. The second question is how the principle of proportionality carried from Magna Carta into the Excessive Fines Clause is to be applied to control the size of punitive damages awards, such as the $1.6 million award in this case, which are constitutionally "excessive." As amici will demonstrate, both of these questions may be answered by reference to the history of Magna Carta's adoption of the principle outlawing excessive amercements, the implementation of that principle in the courts and statutes of England, and ultimately the incorporation of that principle in the Excessive Fines Clause of the Eighth Amendment.

II. THE EXCESSIVE FINES CLAUSE AND ITS ENGLISH ANTECEDENTS WERE INTENDED TO CONTROL THE SIZE OF MONETARY AWARDS IMPOSED FOR THE PURPOSES OF PUNISHMENT AND DETERRENCE

The governmental purposes of the punitive damage award in this case and of such awards generally is common ground: to punish the wrong-doer and to deter others who may engage in the same conduct. In the context of the tort of bad faith failure to pay an insurance claim in Mississippi (and in other jurisdictions recognizing this tort), the punitive damage component of the total judgment is fundamentally different from the actual contract damages component because the punitive damage component does not, in theory or actuality, compensate the plaintiff for losses suffered by reason of a breach of the insurance contract. Rather, a punitive damage award is made for the purpose of responding to the injury to the public which

assertedly occurs in the course of the commission of an offence, here the offence of an insurer against its insured.

As stated by the court below, its "law" of bad faith

> authorize[s] a quantum of punitive damages [in] that amount reasonably necessary to punish [Bankers Life] and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant.

J.S. App. 50a, 483 So.2d 254, 278 (1985).

Punitive damages have been correctly characterized as "serv[ing] the same function as criminal penalties and [being] in effect private fines." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages "are private fines levied by civil juries").

Monetary fines imposed to vindicate the public's interest in a public wrong committed by one private person against another have a long and abiding place in the English legal system, which was inherited and understood by the Framers of the Constitution and the Bill of Rights. The Framers also, as amici will demonstrate, understood the restraints which had been placed by Magna Carta and subsequent English statutes, including the English Bill of Rights of 1689, on monetary awards designed to punish and deter, and they incorporated those restraints into the Eighth Amendment.

A. *The History of Monetary Punishments Prior to Magna Carta*

Prior to the Norman Conquest in 1066, a practice existed in England under which the victim of a wrong, rather than seeking vengeance through retaliation or "blood-feud," could instead secure financial compensation from

the perpetrator of the offence. Gradually, this system became mandatory, limiting the right to seek personal revenge to situations in which the injured person had sought and been refused compensation from the wrong-doer.[4] Such compensatory sums, known as "wers" or "bots," were imposed as compensation due to the victim. At the same time, however, a further payment, known as a "wite," would be exacted from the wrong-doer as a sum "due to the community, on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim."[5] This theory remains, centuries later, as the bedrock of punitive damage theory under which the award against Bankers Life was imposed.

This relatively fixed and certain system of settling grievances under Anglo-Saxon law was, at some point after the Norman Conquest, succeeded "by a system, or lack of a system, by which the convicted party was 'in the king's mercy'. . . ."[6] Under this system, the wrong-doer's life, limbs and possessions were put at the King's mercy; the peace was thereafter restored by payment of a sum to compensate the victim for his losses—contemporary actual damages, and payment to the Crown of a sum known as an amercement[7]—today's punitive damages.

Because in theory a wrong-doer was "at the mercy" of the King, there was no limit on the amount he could be

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[4] *See* W. McKechnie, *Magna Carta* 284-85 (2d ed. 1958). The objective of discouraging persons from seeking revenge was reiterated seven centuries later in one of the first English cases recognizing a right of recovery of "exemplary" damages in purely private litigation. *See Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764).

[5] W. McKechnie, note 4 *supra*, at 285. According to McKechnie, the size of wers and wites was often determined by various codes. *Id.*

[6] J. Jolliffe, *The Constitutional History of Medieval England* 225 (3d ed. 1954).

[7] W. McKechnie, note 4 *supra*, at 286. This payment to the Crown was based on the theory "that offences against the established order were offences also against the King . . . ." *Id.* at 80.

amerced. However, rules were formulated under which the amounts initially amerced were regulated by the gravity of the particular offence involved and the ability of the wrong-doer to pay. The purpose of these rules was to prevent arbitrary and excessively large amercements, a need made urgent because "most men in England must have expected to be amerced at least once a year."[8]

Consistent with the theory that amercements were designed to remedy the wrong done to the public rather than to compensate the wrong-doer, amercements would generally be assessed in a two-stage process. In the first stage, the maximum possible amercement would be determined by the justices of the court, who had the "duty to see that the amount was proportionate to the gravity of the offence."[9] Indeed, the history of amercements during the 11th Century records some instances in which the function of setting such a cap on amercements in individual cases was taken away from the justices, with the maximum amounts being set by the equivalent of statutes.[10]

The second-stage process of determining the actual amount of the amercement to be imposed in a particular case involved twelve (or fewer) neighbors who "affeered" or taxed the amercements, "reducing them in accordance with their knowledge of the wrong-doer's ability to pay."[11] Thus, while "[w]ealth was one of the accepted bases for fixing a fine . . . ,"[12] it is more accurate to say that the *lack* of wealth functioned in this second stage of the amercement process to allow for the reduction of the potential amercement which had been set based upon the

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[8] 2 F. Pollock & F. Maitland, *The History of English Law* 513 (2d ed. 1909).

[9] W. McKechnie, note 4 *supra*, at 288.

[10] *See* J. Holt, *Magna Carta* 50, 230-31 (1965).

[11] W. McKechnie, note 4 *supra*, at 288.

[12] R. Stringham, *Magna Carta: Fountainhead of Freedom* 13 (1966).

gravity of the offence and *not* upon the identity, status or wealth of the perpetrator.[13]

Although the Norman system worked reasonably well through the reign of Henry II, the reigns of his successors, Richard I and John, led, *inter alia*, to the increasingly frequent imposition of larger and larger amercements. Under John, "[t]he whole administration of justice [was] degraded into [an] instrument[ ] of extortion."[14] This extortion was practiced at all levels of the court system, affecting freemen, barons and clergy.

B. *Magna Carta's Response to the Problem of Excessive Monetary Punishments*

Although the events leading up to the drafting of Magna Carta and its presentment to King John are complex, the unbridled imposition of excessive amercements was a point of major concern to the barons who presented John with their draft of Magna Carta at Runnymede on June 15, 1215. Three chapters of Magna Carta as accepted by John on that date were devoted to the problem of excessive amercements.[15] Chapter 20 provided as follows:

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[13] As explained and reinforced in the 16th Century case of *Knyght v. Gunter* (1534), decided in the Court of Star Chamber, "[t]he amercement was the act of the Court [and was] reduced to a certainty, by the oath of a jury.... [The] jurors [were] sworn to affeere, that is, tax and moderate the general amercement according to the particular circumstance of the offence and the offender." 25 Selden Society 210, 213 n.30 (1910).

[14] W. McKechnie, note 4 *supra*, at 22.

[15] The problem of excessive amercements had been addressed in Chapter 37 of the Articles of the Barons, a document which in many respects formed the basis for Magna Carta itself. That document, prepared earlier in 1215 by the barons, dealt expressly with excessive amercements, differing from Magna Carta's three chapters on that subject largely by its lack of adequate protection for barons and clergy. *See* W. McKechnie, note 4 *supra*, at 37, 490.

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

Chapter 21 applied these same general principles to earls and barons, while Chapter 22 applied these principles to clergy.[16]

As discussed above, the method by which amercements were, both before and after Magna Carta, actually imposed serves to elucidate both the procedural and substantive content of Chapter 20. The limits of exposure to amercement for any specific wrong were based upon the relative severity of the offence involved. Threepence was a common amercement for petty offences both before and after 1215.[17]

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[16] At King John's entreaty, Pope Innocent issued a papal bull on August 24, 1215 which "vacated the whole charter as unjust and obtained by compulsion . . . ." W. Blackstone, *The Great Charter and Charter of the Forest* xxv-xxvi (1759). However, in 1216 Henry III, upon ascending the throne at the age of nine, "renewed the great charter which was granted by his father, with such alterations and amendments as the circumstances of the times had made necessary." *Id.*, at xxvii (footnote omitted). After additional reissuances by subsequent Kings, the last occurring in 1300, Magna Carta was subsequently "confirmed, and commanded to be put in execution" by thirty-two separate acts of Parliament. *Id.* at lxxiii-lxxiv.

[17] W. McKechnie, note 4 *supra*, at 286-87 & n.3. Fitzherbert interpreted the language of Chapter 20 as limiting an amercement to the "Value of the Trespass"—no more than the single damages which were awarded to the wronged party. Fitzherbert, *Natura Brevium*, *as quoted* in F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629*, 45 (1948).

Chapter 20 provided that the size of the amercement ultimately imposed might, or perhaps should,[18] be *reduced* below the maximum prescribed amercement based upon the wrong-doer's ability or inability to pay, that determination to be made by a body of the wrong-doer's peers based upon their investigation of the wrong-doer's financial circumstances.[19] Chapter 20 also provided that no amercement could be imposed if to do so would, as in the case of a merchant, result in not "saving his 'merchandise.'" This meant that, in addition to its other safeguards, Chapter 20 "saves to [a merchant] his means of earning a living."[20] A similar guarantee was extended to freemen, whose contenement—"salvo contenemento"—must be saved. And even an amercement, once settled on by these peers, could ultimately be pardoned altogether by the court based upon the "poverty" of the person to be amerced.[21]

C. *The Early Impact of Magna Carta on Excessive Monetary Punishments*

The amercements clauses, unlike many other provisions of Magna Carta which dealt solely with the relationships between the barons and the Crown, were of universal interest and impact among the Crown's subjects. "Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." F. Mait-

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[18] According to Fitzherbert, the amercement ultimately affeered was supposed to be less than the maximum possible amercement: "For the Nature of the Word (*Mercy*) is, that a Man shall not be punished so much as he hath deserved." A. Fitzherbert, *Natura Brevium* 169 (f. 76) (6th ed. 1718).

[19] If an amercement was assessed by a judge rather than by the peers of the person amerced, it was subject to being set aside. *See* F. Thompson, note 17 *supra*, at 63 & n.91.

[20] W. McKechnie, note 4 *supra*, at 289. McKechnie observes that "merchandise" might have been understood to refer broadly to a merchant's "position as a merchant" or more narrowly to his "wares." *Id.*

[21] *Id.* at 288.

land, *Pleas of the Crown for the County of Gloucester* xxxiv (1884), *as quoted in* F. Thompson, note 17 *supra*, at 44. The central point of these clauses was to remove, to the maximum extent possible, the *arbitrary* element in the exaction of amercements: "The Crown must conform to its own customary rules."[22]

The history of the actual practice of the English courts under Magna Carta generally, and under the excessive amercements clauses specifically, establishes that the royal courts of England relied on the amercements clauses to invalidate excessive punishments. Magna Carta was frequently relied upon in the English courts by parties in purely private litigation,[23] and judgments contrary to Magna Carta were to be held "for nought."[24] This reliance on Magna Carta was justified based upon the nature of the Charter itself and on enactments of Parliament which directed "that the Great Charter . . . be kept and maintained in all Points." 4 Edw. III, ch. I.

The fullest early exposition of the successful reliance by a private party on Chapter 20 of Magna Carta is to be found in the case of *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted*

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[22] *Id.* at 287.

[23] *See* F. Thompson, note 17 *supra*, at 33. *See, e.g.*, 55 Selden Society 2, 3 (cas. no. 2); 45 (cas. no. 34); 90 (cas. no. 65); 57 Selden Society 9, 11 (cas. no. 5); 25 (cas. no. 14); 58 (cas. no. 31); 67 (cas. no. 33); 89; 58 Selden Society 19, 20 (cas. no. 8); 21 (cas. no. 9); 69, 73 (cas. no. 42); 88, 90 (cas. no. 54); 112, 114 (cas. no. 65); 147, 148 (cas. no. 79); 211, 218 (cas. no. 106).

[24] W. Dunham, "Magna Carta and British Constitutionalism," in *The Great Charter*, note 3 *supra*, at 25. As Professor Dunham observes, at least from the time (1297) that Edward I declared Magna Carta to be part of the common law, the provisions of Magna Carta were applied by the English courts as statutory law, *id.*, constituting the criteria for determining right law from wrong law and the unjust from the fair. *Id.* at 30.

in 52 Selden Society 3 (1934).[25] In that case, Richard Le Gras had previously brought an action against several private parties which was held by the court to have been improperly pleaded. As a result of this improper plea, the Baliff of the court amerced Le Gras one mark and subsequently seized two horses from Le Gras in satisfaction of the one-mark amercement.

Le Gras then brought a writ of *moderata misericordia*, founded on the amercements clauses,[26] to challenge the amercement by the Baliff. Le Gras's challenge appears to have been procedural—the Baliff had himself assessed the amercement rather than a group of Le Gras's peers, *see* note 21 *supra*, and substantive—the imposition of a one-mark amercement was alleged to be disproportionate to his offence under Chapter 20. As a result of the writ brought by Le Gras, the Baliff was directed to "take a moderate amercement proper to the magnitude and manner of that offence, according to the tenour of the Great Charter of Liberties of England . . . ." 52 Selden Society, at 5 (footnote omitted) (transl. of rec.).

Reported English cases decided subsequently to *Le Gras* amply demonstrate the point, discussed above, that "the amercement should be in proportion to the wrong done" and that "this meant the wrong done to the lord or the

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[25] In 1225, Magna Carta was again reaffirmed and some changes to the original version were made, including the consolidation of Chapters 20, 21 and 22 into a single chapter renumbered as Chapter 14. Because the original version of Magna Carta was lost for many centuries, *see* F. Thompson, note 17 *supra*, at 6-7, Chapter 14 of the 1225 version was cited by the courts and parties in cases, including *Le Gras*.

[26] The writ *de moderata misericordia* was recognized as having been created by Chapters 20, 21, and 22 of Magna Carta and was generally available to challenge the excessiveness of amercements due to the Crown as well as amercements due to lords. *See* S. Milsom, *Legal Introduction to Novae Narrationes* (E. Shanks ed.), in 80 Selden Society cci-cciii (1963).

court, and not the other party to litigation . . . ."[27] Indeed, the reported cases indicate that it was common practice for a person to be found "in mercy" by a court but to have the actual amercement assessed in an essentially separate proceeding which might occur well after the judgment against him had been entered. For example, in the 13th Century, reports of numerous cases in which jurors were amerced indicate that the assessments of the amercements came at the end of the court's term and that the assessments were imposed by a single group of peers of all of those previously amerced. *See* 96 Selden Society xii (1981).

D. *Magna Carta in England in the 16th-18th Centuries*

By the 16th Century, the role of Magna Carta in the English legal system was well established. Coke's view of the primacy of Magna Carta was clear:

> The highest and most binding laws are the statutes which are established by parliament; and by authority of that highest court it is enacted . . . that if any statute be made contrary to the great charter . . . that shall be holden for none . . . .

E. Coke, *The Second Part of the Institutes of the Laws of England*, Proeme at 7th unnumbered page (1797). By Coke's day, the distinction between amercements and fines which had existed in the 13th century had all but vanished. In the 13th Century, the word "fine" encompassed only "voluntary offerings made to the King to obtain some

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[27] *See id.*, at cci (footnote omitted) (relying on Fitzherbert, *Natura Brevium* f. 75E). Fitzherbert made this point very strongly, stating that the

> Amercement shall not be unto the Value of the Damages which is done unto the [wronged person], but having Regard unto the Wrong and Offence done unto the Lord for the Wrongs done unto his [wronged person].

A. Fitzherbert, note 18 *supra*, at 168 (f. 75).

favour or to escape punishment." W. McKechnie, note 4 *supra*, at 293. Indeed, even after 1215 this pre-existing practice of imposing such "fines" was a means of evading Magna Carta, because a judge could threaten a defendant with a prison sentence and then exact from that defendant an enormous fine, payment of which would allow the defendant to escape imprisonment. This exaction could occur, unlike the imposition of an amercement, without the interposition of the defendant's peers as required by the amercements clauses. *Id. See also* 2 F. Pollock & F. Maitland, note 8 *supra*, at 517-18.[28]

An amercement, in sharp contrast, was a sum imposed as a punishment which had no "voluntary" element to it. Under the system of amercements—in contrast to the system of fines—justice could not be bought and sold. Over the intervening centuries between 1215 and the early 17th Century, this "option" of buying justice was gradually eliminated and, with that elimination, the word "fine" took on its more modern meaning and the word "amercement" was no longer generally used.[29]

This use of the word fine carried through into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2 (1689), which provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and

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[28] "Fines" as that term was understood in the 13th Century are addressed in Chapter 55 of Magna Carta, which provides in pertinent part:

> All fines made . . . unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted . . . .

W. McKechnie, note 4 *supra*, at 454.

[29] *Id.* at 293. The late 15th Century furnishes an example of the interchangability of the words amercement and fine where, in an action for debt, a defendant could either be required to "make a grete fyne, [or] in other casys bot to be amersyd." 1 *Borough Customs* (M. Bateson ed.), in 18 Selden Society 206 (1904).

unusuall Punishments inflicted." That document, based upon the Declaration of Rights under which William and Mary, by accepting it, had been permitted jointly to ascend the throne in February of 1689, was "in the tradition of Magna Carta." G. Smith, *A Constitutional and Legal History of England* 367 (1955). In that tradition, the Bill of Rights of 1689 listed the arbitrary acts of the Stuart Kings which had finally brought on the Revolution of 1688, including the imposition of "unduly heavy fines." *Id.* at 368. These documents were, as discussed below, later "to serve as the models for like provisions in the American Bill of Rights." 1 B. Schwartz, *The Bill of Rights: A Documentary History* 41 (1971).

The juridical vitality of the amercements clauses of Magna Carta as reiterated in the English Bill of Rights of 1689 was recognized within three months of enactment of the latter in *Earl of Devon's Case*, 11 State Tr. 1354 (1689). In that case, William Earl of Devonshire had been proceeded against before the King's Bench as a result of his striking a Colonel Culpepper within the environs of the King's Palace. For that act, the Earl was fined 30,000 pounds. *Id.* at 1357. His case was appealed to the House of Lords on several grounds, including the "excessiveness of the fine." *Id.*

In the argument made to the House of Lords on behalf of the Earl, it was contended, *inter alia*, that the fine was disproportionate to the level of fines normally imposed for such an offence: "wherever the law has set down a fine, either by way of punishment or caution, it seldom exceeds 2,000*l*." *Id.* at 1364. The privileges committee of the House of Lords reported the case to the House on April 22, 1689. The House of Lords, after deliberation, concluded, on May 6, 1689, that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land." *Id.* at 1370. Magna Carta, of course, could have been thought applicable if, and only if, the Lords had understood that

the amercements clauses reached "fines" such as the fine imposed against the Earl of Devonshire.

The unbroken continuum anchored by the amercements clauses of Magna Carta and reiterated in the prohibition on "excessive fines" in the English Bill of Rights of 1689 is confirmed by Solicitor General Blackstone in the 18th Century. In Volume 3, of his *Commentaries*, which is devoted to "Private Wrongs," Blackstone identifies six types of private civil actions in which, if the private plaintiff prevailed, the defendant was required to pay a fine to the Crown. 3 W. Blackstone, *Commentaries on the Law of England* *118-19, *138, *179, *188, *398, *402 (1768). Such fines would have been subject to the Excessive Fines Clause of the English Bill of Rights of 1689. *See, e.g., Griesley's Case*, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C.P. 1588).

E. *The Influence of Magna Carta in the Colonies*

It was to the English Bill of Rights of 1689, "as to Magna Carta, [that] the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen . . . ." Indeed, these "[r]ights and liberties of Englishmen embodied in Magna Carta, the Bill of Rights, and other constitutional documents became vital features of colonial constitutional law . . . ."[30]

The Massachusetts Body of Liberties of 1641 is one of the earliest examples of the direct incorporation into colonial law of the excessive amercements principle of Magna Carta. It is a particularly important example because it establishes that the colonists believed that the excessive

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[30] H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," in *Magna Carta Commemoration Essays* 182, 183-184 (H. Malden ed. 1917). Hazeltine traces the basis for the colonists' repeated assertions of entitlement to the rights and liberties of Englishment to the early Royal Charters, such as the first Virginia Charter granted by James I, which specifically asserted that colonists in Virginia were to enjoy those rights. *Id.* at 187.

amercements principle was applicable to fines imposed on a private litigant where the fine was payable directly to the opposing private litigant rather than to the Crown.

In 1635, the Massachusetts General Court decided that "some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which . . . should be received for fundamental laws." 1 *Mass. Records* 147, *as quoted in* G. Haskins, *Law and Authority in Early Massachusetts* 36 (1960). The result of this effort was the Massachusetts Body of Liberties of 1641 ("Liberties of 1641"), section 37 of which read, in pertinent part, as follows:

> In all cases where it appeares to the Court that the plantife hath wilingly and witingly done wronge to the defendant in commenceing and prosecuting any action or complaint against him, They shall have power *to impose upon him a proportionable fine to the use of the defendant* . . . .[31]

The Liberties of 1641, however, proved unsatisfactory to a group of freemen of the colony of Massachusetts who, in 1646, petitioned the Governor and General Court for a more complete and specific set of rules. A. Howard, *The Road from Runnymede* 41 (1968). The General Court responded to this petition by issuing a document entitled the Massachusetts "Parallels" in which the General Court sought to alleviate the concerns which had been expressed by demonstrating the relationship between the provisions

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[31] Massachusetts Body of Liberties of 1641, § 37, *as quoted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 76 (1971) (emphasis added). Paralleling the quest for certainty and freedom from arbitrariness which characterized the evolution of the amercements clauses, the General Court had, by 1648, amended section 37 so as to provide that the erring plaintiff "shall pay treble damages to the partie grieved, and be fined fourty shillings to the Common Treasurie." *The Laws and Liberties of Massachusetts* 49 (T. Barnes ed. 1982).

of the Liberties of 1641 and Magna Carta. The "Parallels" read, in pertinent part, as follows:

Magna Charta	Fundamentalls of the Massachusetts
7. No amerciament shall be, but for reasonable cause, and according to the quantity of the offence; saveing to a freeman his freehould, and to a merchant his merchandize; and no such amerciament to be assessed but by the oaths of good and lawful men of the vicenage.	7. Upon unjust suites the plaintiff shall be fined proportionable to his offence. Liberty, 37. No mans goods shall be taken away, but by a due cause of justice. Liberty, 1. In criminal causes it shall be at the liberty of the accused partie, to be tryed by the bench or by a jury. Liberty, 23. We do not fine or sentence any man, but uppon sufficient testimonie upon oath, or confession. Custome.

A. Howard, *supra*, at 404. The Fundamentalls establish that the members of the General Court regarded the amercements clauses of Magna Carta as applicable to fines imposed in civil cases even though the fine was paid to the defendant.

The Pennsylvania Frame of Government of 1682 was equally, if not more, specific as regards the incorporation of the amercements clauses into the fundamental law of Pennsylvania. That document is of particular importance, being regarded as "[i]n many ways, the most influential of the Colonial documents protecting individual rights . . . ." 1 B. Schwartz, *supra*, at 130. William Penn, who in 1687 was responsible for the first publication of Magna

Carta in America, A. Howard, *supra*, at 89, drafted the Frame of Government and brought it with him from England in 1682. *Id.* at 88. The "most important guarantees of the Penn document (at least in their influence on later Bills of Rights) [had] to do with judicial procedure," 1 B. Schwartz, *supra*, at 131. Section XVIII specifically provided that "all fines shall be moderate, and saving men's contenements, merchandize, or wainage." *Id.* at 141. Once again, it is clear from the unqualified language chosen that Penn, as did the General Court of Massachusetts, understood Chapter 20 of Magna Carta to be applicable to fines, whether rendered in civil or criminal cases.

In 1683, the New York General Assembly enacted the New York Charter of Libertyes and Priviledges of 1683, which provided in pertinent part:

> That A ffreeman Shall not be amerced for a small fault, but after the manner of his fault and for a great fault after the Greatnesse thereof Saveing to him his freehold, And a husbandman saveing to him his Wainage and a merchant likewise saveing to him his merchandize And none of the said Amerciaments shall be assessed but by the oath of twelve honest and Lawfull men of the Vicinage provided the faults and misdemeanours be not in Contempt of Courts of Judicature.

1 B. Schwartz, *supra*, at 165.[32]

In 1712, the colonial legislature of South Carolina enacted Magna Carta into law in that colony, while the North

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[32] As in the Pennsylvania Frame of Government of 1682, *see* 1 B. Schwartz, note 31 *supra*, at 141, the New York Charter of Libertyes provided for bail in a provision separate from the provision dealing with excessive fines, *id.* at 166.

Carolina legislature followed suit in 1715. *See* H. Hazeltine, *supra*, at 196. These actions demonstrate that the colonists were both familiar with the protections provided by Magna Carta and that they desired to implement those protections in the colonies while adapting them to the special circumstances which existed in the colonies.[33]

F. *The Treatment of Excessive Monetary Punishments in Revolutionary Declarations and Constitutions*

At the time of the Declaration of Independence, the English Bill of Rights of 1689 had joined Magna Carta as the second major documentary expression of the rights of Englishmen. Thus, its language respecting excessive fines was incorporated in a number of revolutionary declarations which were issued. For example, the Virginia Declaration of Rights of 1776, authored by George Mason, "repeated from prior documents the right against excessive bail and fines . . . (this time using the very language of the English Bill of Rights that was to become the Eighth Amendment) . . . ." 1 B. Schwartz, *supra*, at 233. The same basic language from the English Bill of Rights of 1689 was also adopted in other colonies. *See id.* at 278 (Delaware Declaration of Rights of 1776, § 16); 282 (Maryland Declaration of Rights of 1776, § XXII); 287 (North Carolina Declaration of Rights of 1776, § X).

The colonists, however, clearly assumed the interchangability of language in Magna Carta and the English Bill of Rights of 1689 where each document addressed the same subject. In Pennsylvania, language more closely associated with Chapter 20 of Magna Carta was utilized to address the problem of excessive fines. Thus, the language

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[33] The adoption and adaptation of Magna Carta's amercements clauses by the colonists paralleled the somewhat better known adoption and adaptation of Chapter 39 of Magna Carta into what ultimately became the Due Process Clause of the Fifth Amendment. *See* A. Howard, *The Road from Runnymede* 37-38 (1968); H. Hazeltine, note 30 *supra*, at 218-19.

of Section XVIII of the Pennsylvania Frame of Government of 1682, based squarely on Chapter 20 as discussed above, was merely shortened to read, in section 29 of the Pennsylvania Declaration of Rights of 1776, "all fines shall be moderate." 1 B. Schwartz, *supra*, at 272. As observed by Professor Howard, *see* A. Howard, *supra*, at 213, the concept of proportionality in the Eighth Amendment arises directly out of Chapter 20 of Magna Carta, and only indirectly out of the language of the English Bill of Rights dealing with cruel and unusual punishments. This observation is confirmed by this Court's decision in *Solem v. Helm*, 463 U.S. at 285, in which it is stated that the principle of proportionality in Magna Carta's amercements clauses was "repeated" in the English Bill of Rights of 1689.[34]

G. *George Mason's Objections to the Federal Constitution*

George Mason, the author of Virginia's Declaration of Rights, 1776, objected to the proposed Federal Constitution in part because there was not, as Mason observed, a "declaration of rights . . . ." 1 B. Schwartz, *supra*, at 444. Mason went on to argue that in the absence of a federal declaration of rights, "the people [are not] secured even in the enjoyment of the benefit of the common law . . . ." *Id.*, at 444-45. (Magna Carta had been declared to be part of England's common law in 1297 by statute, 25 Edw. I,

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[34] The dissent in *Solem v. Helm* took the view that the Cruel and Unusual Punishments Clause of the Eighth Amendment did not incorporate Magna Carta's principle of proportionality but, rather, was directed only to eliminating the various kinds of torture imposed in the reign of the Stuart Kings. 463 U.S. at 312 (Burger, C.J., dissenting). Even if that view had prevailed in *Solem*, the concept of proportionality is necessarily inherent in the notion of an "excessive fine," leaving no doubt that at the very least Magna Carta's principle of proportionality was incorporated into that part of the English Bill of Rights which addresses excessive fines.

ch. I, 1 Stat. at Large 131-32.) The proponents of the proposed constitution responded:

> The principles of the common law, as they now apply, must surely always hereafter apply, except in those particulars in which express authority is given by this constitution . . . .

Id. at 450. Mason was not persuaded and thereafter he

> led the attack on the [proposed] Constitution, drawing on the historical example of the English documents, such as Magna Carta and the Bill of Rights, which served to secure the liberties of Englishmen.

A. Howard, supra, at 222-23.[35] In the state ratifying conventions, however, the proponents initially prevailed, largely on the argument that because the proposed Constitution, unlike any comparable English document, was designed as a limit on governmental power, individual rights were not be be assumed to have been relinquished. *See id.* at 230-31.

Mason's views, shared by many others, ultimately prevailed when the Bill of Rights became, only four years later, "the bridge between Magna Carta in England and the Charter's legacy in America. *Id.* at 239-40. The Excessive Fines Clause of Eighth Amendment, lifted verbatim from the Virginia Declaration of Rights of 1776 and the English Bill of Rights of 1689, brought with it centuries of history which convincingly demonstrates its applicability to monetary fines imposed for the proposes of punishment and deterrence.

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[35] As Professor Howard observes, Magna Carta was largely irrelevant to the unamended Constitution because Magna Carta was not "in the main concerned with the distribution of governmental powers . . . ." A. Howard, note 33 *supra*, at 220.

CONCLUSION

The *ad hoc* system under which Mississippi (and other States) metes out punishment in the form of punitive fines imposed by civil juries pursues the same governmental objectives as the system under which wites, amercements and fines have been imposed in England for a millennium. However, the courts of this country have failed to recognize that the common law system which authorizes the imposition of punitive fines simultaneously restricts the amount of those fines and that the Eighth Amendment at the very least incorporated the controls in Magna Carta and the English Bill of Rights that evolved in England between 1215 and 1791. It is therefore necessary for this Court to announce that the Eighth Amendment requires the restoration of coherence and balance to a penal system which has become distorted by permitting punishments without applying the controls which limit those punishments.

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Respectfully submitted,

Of Counsel:

DARRELL S. RICHEY
VICE PRESIDENT AND GENERAL COUNSEL
GOLDEN RULE INSURANCE COMPANY
712 11th Street
Lawrenceville, Ill. 62439

THOMAS J. NORMAN
ALLSTATE INSURANCE COMPANY
4 Allstate Plaza
Northbrook, Illinois 60062

COLIN MCRAE
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
TRANSAMERICA INSURANCE COMPANY
1150 South Olive Street
Los Angeles, California 90015

*GEORGE C. MONTGOMERY
MONTGOMERY, GASCOU, GEMMILL & THORTON
1100 Glendon Avenue, Suite 1800
Los Angeles, California 90024
(213) 879-9115

**Counsel of Record for* Amici Curiae

Of Counsel:

N. DOUGLAS MARTIN, JR.
ASSISTANT VICE PRESIDENT & COUNSEL
FIREMAN'S FUND INSURANCE COMPANY
777 San Marin Drive
Novato, California 94998

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IN THE
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Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

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Of Counsel:
DOUGLAS P. JACOBS
CBS Inc.
51 West 52nd Street
New York, New York 10019
Attorney for CBS Inc.

(Additional Of Counsel inside cover)

P. CAMERON DEVORE *
MARSHALL J. NELSON
LAURA J. BUCKLAND
DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON D.C. 20001

JANICE B. STANTON
Dow Jones & Company, Inc.
200 Liberty Street
New York, New York 10281
Attorney for
Dow Jones & Company, Inc.

HARVEY L. LIPTON
ROBERT J. HAWLEY
The Hearst Corporation
959 Eighth Avenue
New York, New York 10019
Attorneys for
The Hearst Corporation

SANDRA S. BARON
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
Attorney for National
Broadcasting Company, Inc.

DIANA M. DANIELS
Newsweek, Inc.
444 Madison Avenue
New York, New York 10022
Attorney for Newsweek, Inc.

HARRY M. JOHNSTON, III
Time, Inc.
1271 Avenue of the Americas
New York, New York 10020
Attorney for Time, Inc.

LAWRENCE GUNNELS
Tribune Company
435 N. Michigan Avenue
Chicago, Illinois 60611
Attorney for
Tribune Company

BOISFEUILLET JONES
The Washington Post
1150 - 15th Street, N.W.
Washington, D.C. 20071
Attorney for
The Washington Post

RICHARD M. SCHMIDT
COHEN & MARKS
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036
Attorney for
American Society
of Newspaper Editors

HENRY L. BAUMAN
STEVEN A. BOOKSHESTER
National Association
of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
Attorneys for National
Associaiton of Broadcasters

BRUCE W. SANFORD
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorney for The Society of
Professional Journalists

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STATEMENT OF INTEREST

This brief is submitted on behalf of eleven amici curiae who include broadcasters, publishers of newspapers and magazines, and associations of working journalists. Together, they comprise a broad cross-section of the news media in this country.*

These amici have an intense interest in the subject matter of this appeal. As members of the news media,

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* Written consent of both parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 36.

they must operate under the constant threat of libel claims, almost all of which seek punitive damages. In recent years both the frequency and amount of punitive damage awards against the media have continued to rise at an alarming rate. The threat of such unrestrained awards affects the nation's media at all levels, from national news organizations to the smallest local newspapers and broadcasters, and interferes with their vital task of keeping the public informed. Amici therefore join in supporting the constitutional limitations urged by the appellant in this case.

For the same reasons, amici also have an interest in insuring that the limitations on punitive damages that have already been recognized by the Court in libel cases are given due consideration in this context. The reasoning of the Court in these prior cases provides both a starting point and a broader perspective for resolution of the issues presently before the Court.

Finally, amici believe it is crucial for the Court to recognize the particular threat of punitive damages to First Amendment concerns, and to consider the impact its decision on the issues in this case will have in libel cases arising out of news reporting and discussion of public affairs.

SUMMARY OF ARGUMENT

The Court has long recognized the danger of unrestrained punitive damage awards and the risk that juries will assess them as "private fines" against unpopular views and defendants. The libel decisions of this Court have discussed the problem at length and have already imposed limitations on punitive awards where discussion of public affairs is involved. The reasoning of these cases has been applied by the Court in non-libel cases as well, and serves as a valuable touchstone for addressing constitutional limitations on punitive damages in general.

As this case demonstrates, punitive damages are awarded in virtually unlimited amounts, without regard to the actual harm caused, and with inadequate standards to insure that "the punishment fits the crime." This absence of control raises serious questions under the due process clause of the Fourteenth Amendment and the excessive fines clause of the Eighth Amendment. Where First Amendment values are implicated, the constitutional infirmities of this process are even more obvious.

Any regulatory scheme affecting First Amendment freedoms (including enforcement of libel laws) demands close scrutiny of its procedures to insure that they do not infringe protected speech. The process employed must be narrowly tailored to reach no further than necessary to serve a substantial state interest. Punitive damage awards in libel cases reach far beyond those narrow restrictions to punish and deter protected speech. They fail to meet the heightened due process requirements where First Amendment interests are involved, and they operate as excessive fines under the Eighth Amendment.

The Court has attempted to control the dangers of excessive libel awards by requiring a showing of "actual malice" as the standard of liability where presumed and punitive damages are sought. However, the actual malice rule has not discouraged plaintiffs from seeking, nor juries from awarding, punitive damages in ever-increasing amounts. The rule addresses only the standard of liability; it exerts no control over the amount or nature of damage awards once the jury believes actual malice has been shown. If the stated goal of "uninhibited, robust, and wide-open" public debate is to be achieved, the Court must also broaden constitutional protection against these arbitrary and excessive awards, as urged by the appellant in this case.

ARGUMENT

I. THE COURT HAS RECOGNIZED CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES IN PRIOR CASES.

In this appeal, the Court is asked to confront the constitutional issues raised by a $1,600,000 punitive damage award against an insurance company that denied a $20,000 claim. The amount of the award, committed to the sole discretion of the jury under Mississippi law, was 3200 times greater than the maximum fine the jury could have imposed for similar conduct under an analogous criminal statute. Jurisdictional Statement at 16. The result raises obvious questions under the due process clause of the Fourteenth Amendment and the excessive fines clause of the Eighth Amendment.

Although the specific arguments advanced by the appellant are relatively new to the Court,[1] the problem of unrestrained damage awards is not. That problem has been a constant theme for over 20 years in the Court's effort to reconcile the common law of libel with competing constitutional limitations.

From the very beginning of this effort in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court recognized that the threat of unrestrained punitive damages raises severe constitutional problems as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id.* at 278 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)).

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court initially rejected the argument that unlimited punitive damages were barred by the First Amendment.

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[1] The appellant in *Aetna Life Ins. Co. v. Lavoie*, 106 S. Ct. 1580 (1986), raised similar arguments. Although the case was decided on other grounds, the Court noted "these arguments raise important issues which, in an appropriate setting, must be resolved." *Id.* at 1589.

Mr. Justice Harlan writing for the Court concluded, *inter alia*, that the finding of "ill will" required for an award of punitive damages under general libel law, coupled with the heightened standard of liability announced by the Court,[2] was sufficient protection for publishers. However, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), he expressly retreated from this position[3] and stated:

> I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.

Id. at 77 (Harlan, J., dissenting).

In the same case, Justices Marshall and Stewart concluded that punitive damages should be prohibited altogether in libel cases involving matters of public interest. They recognized that punitive damages:

> serve the same function as criminal penalties and are in effect private fines. Unlike criminal penalties, however, punitive damages are not awarded within discernible limits but can be awarded in almost any amount. Since there is not even an attempt to offset any palpable loss and since these damages are the direct product of the ancient theory of unlimited jury discretion, the only limit placed on the jury in award-

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[2] Justice Harlan's plurality opinion in *Butts* applied a standard of "highly unreasonable conduct" in place of the *New York Times* "actual malice" standard. However, the majority of the Court agreed that the actual malice rule or even greater protection should apply to "public figures." *See* 388 U.S. at 155. The "ill will" requirement on which Justice Harlan relied to justify punitive damages was therefore inconsistent with the rule ultimately adopted by the Court.

[3] "Reflection has convinced me that my earlier opinion [in *Butts*] painted with somewhat too broad a brush and that a more precise balancing of the conflicting interests involved is called for in this delicate area." *Rosenbloom*, 403 U.S. at 62 n.3.

> ing punitive damages is that the damages not be "excessive," and in some jurisdictions that they bear some relationship to the amount of compensatory damages awarded. [Citation omitted.] The manner in which unlimited discretion may be exercised is plainly unpredictable.

Id. at 82-83 (Marshall, J., dissenting).

These dissenting opinions became the touchstone of the majority opinion in *Gerzt v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court concluded:

> [P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries . . . .

Id. at 350. The Court therefore held:

> [T]hat the States may not permit recovery of presumed or punitive damages, at least when liabiilty is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349.

Most recently, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), Mr. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, reasserted the objections to punitive awards discussed in *Rosenbloom* and *Gertz*, stressing the "largely uncontrolled discretion" of juries to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" as a rationale for the limitations imposed in *Gertz*. *Id.* at 778 (quoting *Gertz*, 418 U.S. at 350).

Although the driving force behind these limitations on punitive damages has been the need to protect First Amendment interests, their logic is not confined to libel and First Amendment cases. The arguments against un-

controlled jury discretion, unlimited "private fines," and unpredictable awards articulated in these cases are just as compelling when applied to the punitive damage award presently before the Court in this appeal. In fact, as Mr. Justice Brennan noted in his opinion in *Dun & Bradstreet*, the reasoning of *Gertz* has been applied in the Court's review of punitive damages in non-libel cases as well: [4]

> These cases, like *Gertz*, recognize that "the alleged deterrence achieved by the punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith v. Wade*, [461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).]

472 U.S. at 780 n.4 (Brennan, J., dissenting).

Amici, as members of the media, are obviously concerned with the special First Amendment problems raised by punitive damages in libel cases. But the focus on libel decisions in this brief is intended to serve a broader purpose. The opinions generated in these cases represent a major part of this Court's writings on the subject of punitive damages. Their reasoning, as noted by Mr. Justice Marshall, has been applied in other kinds of cases and serves as a useful starting point for resolving the constitutional problem of punitive damages in general.

II. THE UNRESTRAINED AWARD OF PUNITIVE DAMAGES VIOLATES DUE PROCESS OF LAW, PARTICULARLY WHERE FIRST AMENDMENT INTERESTS ARE INVOLVED.

Amici agree with appellant that the punitive award of $1,600,000 on the facts of this case raises serious issues under the due process clause of the Fourteenth Amend-

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[4] *See, e.g., Electrical Workers v. Foust*, 442 U.S. 42, 48-52 (1979) (union's breach of duty of fair representation); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) (municipal liability under § 1983).

ment. U.S. Const. amend. XIV. Due process requires, as a minimum, that economic burdens imposed by a state bear some rational relationship to a legitimate state interest and are imposed in a manner that is neither arbitrary nor irrational. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 476-77 (1985). The unlimited discretion exercised by juries in awarding punitive damages invites awards that are both arbitrary and irrational, as any review of recent punitive awards will demonstrate. The extent of the problem is highlighted by the disturbing fact that some of the largest and most irrational awards are occurring in libel cases where, in theory, First Amendment interests demand even greater protection of due process.

A. Punitive Damage Awards Are Not Narrowly Tailored to Serve a Substantial State Interest.

This Court has long recognized that the First Amendment demands careful examination of any form of state regulation that restricts free expression.[5] As this Court stated in *Speiser v. Randall*, 357 U.S. 513, 520 (1957):

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

This Court has also recognized that the allowance of punitive damages in libel cases is an exercise of state regulatory power that is subject to this constitutional limitation. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. at 759 (Brennan, J., dissenting); *New*

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[5] *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (Powell, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *Lovell v. Griffin*, 303 U.S. 444 (1938).

York Times Co. v. Sullivan, 376 U.S. at 269. As such, it must be closely scrutinized to insure that the remedy is in fact necessary to protect a substantial state interest and to insure that it does not encroach upon protected speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 349.

The award of punitive damages in libel cases fails this test both substantively and procedurally. In the words of Mr. Justice Brennan:

> The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle . . . .

Dun & Bradstreet, 472 U.S. at 778 (dissent).

B. The State Has No Substantial Interest in Discouraging Speech on Public Issues.

The state interest usually argued in support of punitive damages is the need to punish reprehensible conduct and to deter future unlawful acts. *See Gertz*, 418 U.S. at 350.[6] Where First Amendment values are involved, however, it is clear that the state has *no* substantial interest in deterring speech, except under the most extraordinary circumstances. *See New York Times Co. v. United States*, 403 U.S. 713, 726 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931). Indeed, the central purpose of this Court in *New York Times Co. v. Sullivan* and its progeny has been to *avoid* deterring free speech, even erroneous speech and speech motivated by less than "good motives." *See Garrison v. Louisiana*, 379 U.S. 64, 69-71 (1965); *New York Times Co. v. Sullivan*, 376 U.S. at 271-72.

In *Gertz*, the Court stated that the "legitimate state interest underlying the law of libel is the compensation

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[6] Whether these goals are even appropriate in the context of *civil* litigation in general is a major issue in this appeal, as is the question of whether such punishment can be imposed without the protections of the criminal process.

of individuals for the harm inflicted on them by defamatory falsehood." 418 U.S. at 341. The Court found punitive damages to be "wholly irrelevant to [this] state interest," *id.* at 350, and stated:

> More to the point, the states have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.

Id. at 349.

Even if a legitimate interest in punishment and deterrence may be postulated in support of punitive damage awards, the cost in First Amendment terms is too high to justify its implementation in libel suits involving public affairs. The attractive prospect of a large "bounty" in punitive damages encourages unnecessary and expensive libel suits; the fear of such awards chills legitimate speech; and the juries are given an uncontrolled weapon to "selectively punish expressions of unpopular views." *Gertz*, 418 U.S. at 350; *see also Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting). In short, the award of punitive damages reaches far beyond protection of a substantial state interest to encroach upon protected speech, and cannot be justified under the First Amendment:

> A government purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom.

NAACP v. Alabama, 377 U.S. 288, 307 (1964).

C. The Requirement of Actual Malice as a Prerequisite to Punitive Damages Is Inadequate, By Itself, to Prevent Unconstitutional Awards.

In *Gertz*, the Court restricted libel awards to compensation for "actual injury." However, the holding was qualified by the words, "*at least* when liability is not based on a showing of knowledge of falsity or reckless disregard

for the truth." 418 U.S. at 349 (emphasis added). The Court thus apparently left open the question of whether, or under what circumstances, punitive damages may be awarded if such a showing is made. *See* Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 847 n.4 (1985).

However, the language has also been interpreted in some cases as permitting punitive damages where actual malice, and nothing more, is shown. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273 (7th Cir. 1983); *see also, Dun & Bradstreet*, 472 U.S. at 761. Under such an interpretation, punitive damages are virtually automatic in all public official/public figure libel cases, unless state law requires some showing beyond that required to establish liability.[7] Even in other libel cases where actual malice may be an additional requirement, punitive damages may be awarded without regard to whether the defendant's conduct was truly "malicious" in the sense ordinarily required to support such an award.

The requirement of actual malice is a tool for defining the standard of *liability*, as the above-quoted language from *Gertz* indicates. *See also Dun & Bradstreet*, 472 U.S. at 770-71 (White, J., concurring). It focuses only on the defendant's attitude toward the facts, not on the defendant's attitude toward the plaintiff or any intent to do harm. It is therefore possible to have a technical finding of "actual malice" as defined by *New York Times* where there is absolutely no evidence of "malicious" conduct in the common sense of the word.[8] The jury is then

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[7] See Note, *Punitive Damages and Libel Law*, 98 Harv. L. Rev. 847, 854 n.43 (1985).

[8] The early decisions in which this Court articulated the rationale of the actual malice rule obviously did not contemplate such a possibility. *Sullivan* and *Garrison* viewed the rule as excluding from protection only the deliberate lie or "calculated falsehood." *See, e.g., Garrison*, 379 U.S. at 74-75; *St. Amant v. Thompson*, 390 U.S.

invited to award punitive damages without further restrictions. (See, *infra*, discussion at pp. 18-20.)

If punitive damages are to be allowed at all in libel cases, the First Amendment requires that the method by which they are assessed must also be confined by adequate procedural safeguards. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959); *Speiser v. Randall*, 357 U.S. 513, 521 (1958) (When a state regulates expression, "it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights."). When the procedures "create an unnecessary and undue risk of an improper verdict on the issue of . . . whether to award punitive damages, and on the measure of punitive damages," due process is violated. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 276 (1983).

In most jurisdictions, there are virtually no restrictions on the manner in which a jury may assess punitive damages in libel cases. Once the plaintiff has convinced the jury that a knowing or reckless falsehood occurred,

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727, 729-30 (1968), reaffirmed this view by requiring a finding of actual "serious doubts as to the truth" to establish "reckless disregard." These cases require a subjective awareness—indeed, "*a high degree* of awareness"—of probable falsity on the part of the publisher before actual malice might be found. *See* Report, Committee on Communications Law, *Punitive Damages in Libel Actions*, 42 Record of Assoc. Bar of City of New York, 20 (Jan./Feb. 1987).

In the lower courts, however, the required showing of actual malice has often been reduced to an exercise in sophistry by libel plaintiffs, asserting "knowledge of falsity," and thus actual malice, on the basis of semantic technicalities and interpretations. *See, e.g.*, this Court's rejection of such arguments in *Bose Corp. v. Consumers Union of United States, Inc.*, 446 U.S. 485 (1984); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). The fact that such cases must reach this Court before the proper constitutional standard is applied merely highlights the continuing vulnerability of the actual malice rule to misinterpretation.

the only limitation is the "gentle rule" that the award not be "excessive." *Dun & Bradstreet*, 472 U.S. at 778 (Brennan, J., dissenting). Despite the punitive nature of the award, libel defendants have none of the protections offered criminal defendants.[9] Informal censorship "obviate[s] the need to employ criminal sanctions . . . [and] at the same time eliminate[s] the safeguards of the criminal process." *Bantam Books v. Sullivan*, 372 U.S. 58, 69-70 (1963).

Reliance on actual malice as the sole prerequisite for punitive damages bypasses even the minimal tort law consideration of whether the defendant's conduct is truly "outrageous" and prompted by "evil motive." *See* Restatement (Second) of Torts § 908(2) (1977). If a knowing or reckless falsehood can be shown to the satisfaction of the jurors, "they remain free to use their discretion selectively to punish expressions of unpopular views." *Gertz*, 418 U.S. at 350. The end result is often exactly the type of content-based punishment that the First Amendment prohibits and this Court has emphatically disallowed. *See Erzoznik v. Jacksonville*, 422 U.S. 205 (1975); *Police Department v. Mosley*, 408 U.S. 92, 95 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971). The procedure fails to satisfy the minimum due process requirements of other regulations affecting free speech.[10]

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[9] *See New York Times v. Sullivan*, 376 U.S. 254, 277 (1964):

> [A] person charged with violation of this [criminal libel] statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. . . . And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded . . . for the same publication.

[10] *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971) (prior restraints); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963) (black-listing); *Marches v. Search Warrant*, 367 U.S. 717 (1961) (searches and seizures); *Cox v. New Hampshire*, 312 U.S.

III. THE EIGHTH AMENDMENT PROHIBITS UNRESTRAINED PUNITIVE DAMAGES AS "EXCESSIVE FINES."

The Eighth Amendment prohibits the imposition of excessive fines, excessive bail, and cruel and unusual punishment. U.S. Const. amend. VIII. Although these limitations are usually considered in the context of criminal punishment, they have also been applied by the Court where analogous civil procedures are involved. *See Ingraham v. Wright*, 430 U.S. 651, 659 n.37 (1977); *In re Gault*, 387 U.S. 1, 29 (1967).

A. Punitives Damages Are "Fines."

As the present case indicates, the analogy between the assessment of unrestricted punitive damages and the imposition of excessive fines is especially compelling. The similarities have been discussed at length in this Court's libel decisions. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. at 350 ("punitive damages . . . . are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *Rosenbloom v. Metromedia*, 403 U.S. at 82-83 (Marshall, J., dissenting) (punitive damages "serve the same function as criminal penalties and are in effect private fines"); *id.* at 74 (Harlan, J., concurring) ("[F]rom the standpoint of the individual plaintiff such damage awards are windfalls. They are, in essence, private fines levied for purposes that may be wholly unrelated to the circumstances of the actual litigant.").

Indeed, the first two decisions of this Court to articulate First Amendment limitations on libel law recognized virtually no difference between criminal punishment and assessment of civil damages in libel cases. *New York*

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569 (1941) (licensing and permits); *Lovell v. Griffin*, 303 U.S. 444 (1938) (licensing and permits).

Times Co. v. Sullivan, 376 U.S. at 177, held in the civil context, "what a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Garrison v. Louisiana*, 379 U.S. at 67 n.3, held in the criminal context, "whether the libel law be civil or criminal, it must satisfy relevant constitutional standards." These observations alone should leave little question that punitive damages are directly analogous to "fines" within the purview of the Eighth Amendment and should be subject to the same protection. *See also Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting) (punitive damages are "fines" and are "quasi-criminal").

B. Punitive Damages Are "Excessive Fines."

Fines are excessive under the Eighth Amendment if they are disproportionate to the harm inflicted and to other punishments for the same conduct. *Solem v. Helm*, 463 U.S. 277, 284 (1983).[11] Although some jurisdictions impose similar limitations on punitive damages, most awards are overturned only if they are "so excessive as to shock the conscience of the Court or to create the impression that the jury was influenced by passion or prejudice." *Gazette, Inc. v. Harris*, 229 Va. 1, 41, 325 S.E.2d 713, 740 (1984), *cert. denied*, 105 S. Ct. 3513 (1985). Thus, although the word "excessive" figures in both tests, the concepts differ markedly in their application.

As the present case suggests, the rule against "excessive" punitive damages often translates into a mechanical calculation of the defendant's net worth and a percentage of that worth represented by the punitive award.

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[11] Although *Solem* is a cruel and unusual punishment case, the "Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishments." 463 U.S. at 289 (quoting *Ingraham*, 430 U.S. at 664).

Thus, even multi-million dollar awards against large corporate defendants may pass the "net-worth" test, despite the lack of any reasonable relationship to the actual harm caused or to fines that may be imposed as criminal punishments for the same conduct.

For the small newspaper or broadcaster even "a punitive damage award that is not so excessive as to shock the judicial conscience may be a sufficient financial burden to silence a voice of dissent." Note, *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 Yale L.J. 610, 613 (1955). This fact was shown dramatically in the case of the *Alton Telegraph*, a small Illinois newspaper, which suffered a $9.2 million libel verdict, including $2.5 million in punitive damages. The company, valued at only $3 million, ultimately settled for $1.4 million after it was unable to raise the bond required for an appeal on the merits. The verdict and settlement have had a demonstrable effect on the ability and willingness of the paper to undertake investigative reporting on controversial matters. *See* Curley, " 'Chilling Effect' How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," Wall St. J., Sept. 29, 1983, at 1, col. 1. *See also*, Massing, *The Libel Chill: How Cold Is It Out There?*, Columbia Journalism Review, May-June 1985, at 31; Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 Fordham L. Rev. 1382, 1384 (1977).

The stated rationale for these apparently irrational results is that the punitive award must carry sufficient "sting" to punish the wrongdoer and deter future wrongful conduct. *Rosenbloom*, 403 U.S. at 73 (Harlan, J., dissenting); Note, *supra* p. 11, at 849. However, the same interests in punishment and deterrence have been addressed in legislative enactments that do not begin to approach such destructive measures. The use of statutory damages, enhanced damages, and similar remedial

measures in excess of actual damages have been deemed sufficient by Congress to serve the state's interests.[12]

A rule that measures punitive damages only against the defendant's apparent wealth is not merely inconsistent with, it is antithetical to, the restrictions of the Eighth Amendment. Where the Eighth Amendment demands proportionality, evenhandedness, and predictability, punitive damages are permitted in "wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

In fact, they are often thousands of times greater than comparable criminal sanctions. For example, In *New York Times Co. v. Sullivan*, 376 U.S. at 277, the Court noted that the judgment of $500,000—fairly modest in light of today's "megaverdicts"—was "1,000 times greater than the maximum provided by the Alabama criminal statute, and 100 times greater than that provided by the Sedition Act." Other cases demonstrate that multi-million dollar punitive damage awards have been imposed even where there was no evidence of actual damage. *See, e.g., Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F. Supp. 1240 (N.D. Ill. 1986) (j.n.o.v. reducing compensatory damages to one dollar, but sustaining $2,050,000 punitive damage award); *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313 (S.D.N.Y.) (one dollar compensatory damages, $1,600,000 punitive damages), *rev'd*, 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1303 (1987).

The Court has often acknowledged the chilling effect of such unpredictable and unlimited awards under the

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[12] *See, e.g.*, Copyright Act, 17 U.S.C. § 504; Communications Act, 47 U.S.C. § 605 (both statutes limit statutory damages to $10,000, $50,000 if willful).

First Amendment and has gone to great lengths to define appropriate safeguards that will shield defendants from overall liability in appropriate cases. However, it has not yet taken the final logical step to control the actual award of punitive damages once liability has been established.[13] This is a separate and equally critical issue, and it is now before the Court.

IV. THE EXPERIENCE OF LIBEL CASES IN THE LOWER COURTS DEMONSTRATES THE DANGERS OF UNRESTRAINED PUNITIVE DAMAGE AWARDS.

Under the reasoning of *New York Times Co. v. Sullivan* and its progeny, the heightened standards of liability and other constitutional limitations imposed on plaintiffs should have resulted in fewer and less costly verdicts against libel defendants. Experience has proved otherwise. Empirical studies show that the amounts awarded to libel plaintiffs at the trial level have actually increased dramatically, and punitive awards are more disproportionate to the actual harm suffered than in other areas of the law.

At least in this limited respect, the actual malice rule has proved inadequate, by itself, to deal with the problem of excessive damages in libel cases. The heightened standards of the actual malice rule, whether applied as a limitation on liability in public official/figure cases, or as a prerequisite to presumed and punitive damages under *Gertz*, do not discourage plaintiffs from seeking, or

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[13] Justices White, Marshall, Stewart and Harlan have previously urged the Court to direct its attention to damages specifically. *See Dun & Bradstreet v. Greenmoss*, 472 U.S. 749, 767 (1985) (White, J., concurring); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 62-78 (1971) (Harlan, J., dissenting); *id.* at 78-86 (Marshall, J., dissenting).

juries from imposing, awards at the astronomical levels of 7- and even 8-figure amounts.

Appendix B to this brief is an excerpt from Bulletin No. 18 of the Libel Defense Resource Center (LDRC), summarizing certain of its recent findings from a continuing survey of libel damage awards. The results are self-explanatory evidence of the extent to which the threat of virtually unlimited damage awards in libel actions against the media has become a reality. The underlying LDRC studies referred to in this excerpt show that over a recent four-year period 33% of all verdicts and 40% of punitive damage verdicts in media libel cases were greater than $1,000,000. The average punitive damage award in such cases was almost $3 million, and juries awarded punitive damages in nearly 60% of those libel cases, compared with less than 10% in other civil cases. A full 80% of the total dollars awarded in media libel cases were given to plaintiffs not as compensation for actual harm, but as punitive damages.

Other writers point to the irrationality of these verdicts, regardless of amount, as further evidence of the problem. *See* Sack and Tofel, *First Steps Down the Road Not Taken: Emerging Limitations on Libel Damages*, 90 Dickinson L. Rev. 609, 612-20 (1986); Note, *supra* p. 11, at 855-58.

The fact that the great majority of these damage awards are overturned or reduced on appeal suggests that the actual malice rule may be more effective at the appellate level. But it also confirms this Court's conclusion in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984), that *de novo* appellate review of such cases is necessary to insure proper application of the rule. This fact highlights additional problems with the current lack of constraints on verdicts at

the trial level. For the small (and even the not-so-small) publisher or broadcaster, the prospect of victory only after an expensive appeal is cold constitutional comfort. The expense and judicial resources committed to such appeals is itself inconsistent with the stated goal of this Court to avoid the chilling effect of unnecessary litigation. And the prospect of punitive damage "mega-verdicts," highly-publicized at the trial stage, may actually be encouraging the prosecution of libel suits even in the face of what has been called the "almost impossible" burden of the actual malice rule. *See Dun & Bradstreet*, 472 U.S. at 771 (White, J., dissenting). The potential pay-off is simply too great to ignore.

The lottery mentality encouraged by the prospect of unrestrained punitive damage awards is not confined to libel cases. It can lead to protracted and expensive litigation in virtually any kind of claim where the defendant's conduct can be made an issue. And, as the experience with libel cases demonstrates, the promise of unrestrained rewards can subvert even the most carefully-drawn system for compensating actual injury, and convert it to an emotional appeal to jury passion and prejudice. The end result is an irrational system in which the costs—"the encouragement of unnecessary litigation and the chilling of desirable conduct"—far outweigh the alleged benefits of punitive damages. *Smith v. Wade*, 461 U.S. at 59 (Rehnquist, J., dissenting).

CONCLUSION

Punitive damages are private fines levied by juries with no discernible limit on the amount and without procedural safeguards demanded by the Fourteenth Amendment. They often bear no relation to the actual harm suffered by plaintiffs or the actual culpability of defendants. As such, they are "excessive fines" prohibited by the Eighth Amendment. Amici join with the appellant in urging constitutional limitations on such awards.

Whatever the Court's decision in this particular case, however, amici also urge the court to recognize the special threat of punitive damages in libel cases, and to ensure that its decision does not allow punishment or deterrence of conduct protected by the First Amendment.

DATED this 29th day of May, 1987.

Respectfully submitted,

P. CAMERON DEVORE *
MARSHALL J. NELSON
LAURA J. BUCKLAND
DAVIS WRIGHT & JONES
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Amici Curiae

* Counsel of Record

Of Counsel:
DOUGLAS P. JACOBS
CBS Inc.
51 West 52nd Street
New York, New York 10019
Attorney for CBS Inc.

JANICE B. STANTON
Dow Jones & Company, Inc.
200 Liberty Street
New York, New York 10281
Attorney for
Dow Jones & Company, Inc.

HARVEY L. LIPTON
ROBERT J. HAWLEY
The Hearst Corporation
959 Eighth Avenue
New York, New York 10019
Attorneys for The Hearst Corporation

SANDRA S. BARON
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10112
Attorney for National Broadcasting Company, Inc.

DIANA M. DANIELS
Newsweek, Inc.
444 Madison Avenue
New York, New York 10022
Attorney for Newsweek, Inc.

HARRY M. JOHNSTON, III
Time, Inc.
1271 Avenue of the Americas
New York, New York 10020
Attorney for Time, Inc.

LAWRENCE GUNNELS
Tribune Company
435 N. Michigan Avenue
Chicago, Illinois 60611
Attorney for Tribune Company

BOISFEUILLET JONES
The Washington Post
1150 - 15th Street, N.W.
Washington, D.C. 20071
Attorney for The Washington Post

RICHARD M. SCHMIDT
COHEN & MARKS
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036
Attorney for American Society of Newspaper Editors

HENRY L. BAUMAN
STEVEN A. BOOKSHESTER
National Association of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
Attorneys for National Association of Broadcasters

BRUCE W. SANFORD
BAKER & HOSTETLER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorney for The Society of Professional Journalists

APPENDICES

APPENDIX A

Identity of Individual Amici

CBS Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks. The CBS Publishing Group publishes numerous nationally distributed magazines and hard-cover books.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's National Business and Financial Weekly*, a variety of national and international electronic news services, textbooks through its Richard D. Irwin, Inc. subsidiary, and 22 community daily newspapers through its Ottaway Newspapers, Inc. subsidiary.

The Hearst Corporation is a diversified privately held company that publishes newspapers, magazines, and hard-cover and soft-cover books, and downs and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

National Broadcasting Company, Inc. is the owner of television and radio broadcasting stations and the operator of national television and radio networks.

Newsweek, Inc. publishes a weekly international news magazine, *Newsweek*.

Time, Inc. is the largest publisher of general circulation magazines in the United States. It publishes *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and *Discover*.

Tribune Company is a communications company owning *The Chicago Tribune*, *The New York Daily News*, the *Orlando Sentinel*, the *Fort Lauderdale News and Sun-Sentinel*, the *Escondido (CA.) Times-Advocate*, the *Palo Alto Times-Tribune*, the *Newport News, Virginia Daily*

Press and *The Times-Herald*, and television stations in Chicago, New York, Los Angeles, Denver, Atlanta and New Orleans.

The Washington Post is a newspaper published in the Washington, D.C. area with a daily circulation of 718,000 and a Sunday circulation of 1,079,000.

The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include ongoing efforts to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The National Association of Broadcasters is a nonprofit, incorporated trade association of more than 4,900 radio stations, 950 television stations, and the major commercial broadcast networks.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of over 21,000 members representing every branch and rank of print and broadcast journalism. It is the largest and oldest organization of journalists in the United States.

APPENDIX B

[The following is an excerpt from the Libel Defense Resource Center Bulletin No. 18 published December 15, 1986.]

Recent Trends in Libel Damage Awards Against the Media

(i) *The Size of Recent Media Damage Awards.*

According to the Libel Defense Resource Center the average (mean) initial damage award in eighty-one media libel actions tried between 1980 and 1984 that resulted in a plaintiff's verdict was *in excess of $2,000,000.* LDRC Bulletin No. 11 (November 15, 1984) at 18 (Table B-9). Even eliminating the distorting effects of three awards of over $10,000,000, the average award during this period still exceeded three-quarters of a million dollars. The average award during a period of several months in 1985, when no eight-figure awards were recorded, was almost $1.8 million dollars. LDRC Bulletin No. 16 (March 15, 1986) at 44.

In terms of the sheer numbers of huge awards, LDRC has reported some *thirty* libel damage *awards* at or *in excess of $1 million* since 1980. [Citation omitted.] In contrast, only *three* media libel *awards* at the *million-dollar* level were reported *in the previous two decades.*

In terms of the relative numbers of huge awards, the pace of million-dollar libel damages has also dramatically increased, according to LDRC data. In the pre-*Sullivan* decade, of thirty-eight libel damage awards initially entered only one was in excess of $1 million—*see* Section (iii), *infra.* In contrast, in the period of 1980-84, *almost 25%* of the awards in media libel actions exceeded a million dollars. LDRC Bulletin No. 4 (Part 1) (August 15, 1982) at 8-17; LDRC Bulletin No. 11, *supra,* at 25-34 (listing cases and awards). In the last several months

of 1985, *more than half* of the media libel awards recorded by LDRC *exceeded the million-dollar mark.* LDRC Bulletin No. 16 (March 15, 1986) at 44.

(ii) *Punitive Damage Awards in Recent Media Libel Actions.*

Almost three out of five of the damage awards recorded by LDRC during the period 1980-84 included an award of punitive damages. More than one-third of those punitive awards was in excess of $1 million. Indeed, the *average punitive award* in those cases was *substantially in excess of $2.5 million.* During the last two years of the period, the average punitive damage award was *almost $3 million.* In terms of dollars awarded, during the period punitive damages accounted for some 80% of the total amount of damages awarded. LDRC Bulletin No. 11, *supra,* at 14-15.

(iii) *Comparison Data: Average Damage Awards in the Decade Prior to Sullivan.*

To put these data into further perspective the LDRC recently compiled a historical review of damages awarded in the decade prior to this Court's decision in *New York Times Co. v. Sullivan.* LDRC found that, in contrast to current trends, the average media libel award during the pre-*Sullivan* period, excluding the distorting effects of the single million dollar award during that entire decade, was *under $50,000.* LDRC Bulletin No. 17 (July 31, 1986). Indeed, the *total* amount of the awards in thirty-seven pre-*Sullivan* media libel cases reporting damage figures (again excluding the single million-dollar verdict) was $1,839,468. This total for thirty seven cases is less than a single average case in today's world of libel litigation. While adjusting for inflation accounts for some portion of this massive disparity, LDRC reports that even in constant dollars to-

day's media libel damage awards remain between 400% and 500% higher than the pre-*Sullivan* decade. *Id.*

(iv) Comparison Data: Media Libel Awards Compared to Damages in Other Areas of Tort Litigation.

LDRC has published data comparing and contrasting these libel trends with damage trends in two other areas of civil tort litigation—medical malpractice and product liability—that are also widely cited as having experienced a pattern of wild damage inflation. These non-libel torts often involve extensive economic injury and severe long-term physical debilitation. Nonetheless, libel actions against the media which rarely entail substantial economic loss, and even less frequently have provable physical impact, were found to yield higher average damage awards. The average damage award in medical malpractice actions for the period 1980-84 was slightly in excess of three-quarters of a million dollars. (When million-dollar malpractice awards were excluded this figure dropped to under a quarter of a million dollars.) The average damage award in product liability actions for that same period was just under a million dollars. (When million dollar product liability awards were excluded this figure dropped to just over a quarter of a million dollars.) Jury Verdict Research, Inc., *Injury Valuation Reports: Current Award Trends*, No. 304 (1986) at 18-19.

As for the frequency of million-dollar awards in these comparison areas, between 1980 and 1984 million-dollar awards were entered in 24% of product liability cases—under the 25% frequency in media libel actions. The frequency of million-dollar awards in medical malpractice actions was lower still—21% during the same period. *Id.*

In contrast to the notable frequency with which punitive damages are being awarded against the media in libel actions, a recent study indicates that during a period ranging from 1981 to 1984 punitive damages were awarded in a relatively low percentage of all civil cases involving an award of money damages. In two-thirds of the thirty-two reporting locations winning plaintiffs were awarded punitive damages less than 10% of the time. In New York City, Chicago and Los Angeles, for example, punitive damages were awarded in 1.6%, 2.2%, and 8.6% of the cases in which money damages were awarded, respectively. Imposition of punitive damages ranged from 0% in some locations to a maximum of 21.6% in the county with the highest rate of punitive awards. *All* locations reported far lower percentages than the recent nearly 60% average for punitive awards in media libel actions. Daniels, *Punitive Damages: The Real Story*, 72 ABA Journal 60 (August 1, 1986).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF *AMICUS CURIAE* JOHNSON & HIGGINS IN SUPPORT OF APPELLANT

JOHN CALVIN JEFFRIES, JR.
University of Virginia
Law School
Charlottesville, Virginia 22901

GEORGE CLEMON FREEMAN, JR.
(Counsel of Record)
WILLIAM F. KENNEDY
HUNTON & WILLIAMS
P.O. Box 1535
Richmond, Virginia 23212
Counsel for *Amicus Curiae*

May 29, 1987

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On Appeal from the Supreme Court of Mississippi

BRIEF OF *AMICUS CURIAE* JOHNSON & HIGGINS IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE*

Johnson & Higgins is one of the largest insurance brokers in the United States.[1] Its clients are businesses, associations and government entities that are insured or self-insured against property and casualty claims. Both Johnson & Higgins and its clients have a vital interest in the maintenance of a healthy insurance and risk financing system in this country.

The key to having adequate insurance made available to the American public at affordable, reasonable costs is

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[1] The consents of Appellant and Appellee for the filing of this brief are on file with the Clerk of the Court.

predictability. Predictability, in turn, is dependent upon a stable legal system where those who must make decisions on whether to act or how to act, and those who must decide whether to insure and if so at what price, can do so with fairly accurate knowledge of the likely legal consequences. This foreseeability of legal consequences is one of the most important elements in predicting economic consequences. Insurers' and self-insurers' decisions are based on estimates as to the probabilities of loss occurring and the potential range of such losses.

While the judge-made common law has always been in an evolutionary process of change, this change traditionally occurred only in small increments. Thus it was possible for insurers to bracket the range in which changes might occur, and thus still assess overall risk with some degree of accuracy.

This country is now in the midst of what the Government has characterized as the "Insurance Availability/ Affordability Crisis."[2] One of the causes of the current crisis is the growth in both the number and size of punitive damage awards. While most insurance policies do not insure against such awards, the growing threat of such awards has now become a major source of uncertainty in litigation involving claims that are within the scope of existing policies. Not only does the presence of punitive claims increase the costs of defense under such policies, but they also make settlements more difficult or impossible.

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[2] *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability.* This interagency working group consisted of representatives of ten federal agencies and the White House. The primary contributing agencies included the Department of Justice, the Department of Commerce, and the Small Business Administration. The Report was dated February 1986 and was made public in late March.

A principal obstacle to fair settlements is that in many jurisdictions, like that below, there is no effective constraint on the size of such awards. There the only standard for settlement is sheer speculation as to what a jury may or may not award.[3] The arguments in this brief demonstrate why judges have an obligation under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to limit such awards that are so disproportionate that they constitute excessive punishment. Articulation of that principle in this case will go far to restore both fairness and predictability to our legal system.

SUMMARY OF ARGUMENT

As a matter of common sense, it seems obvious that an award of punitive damages should bear some reasonable relation to the nature of the misconduct. Yet current practice allows imposition of punitive damages in amounts grossly disproportionate to any legitimate basis for punishment. Such awards not only offend common sense; they also violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT

I. PUNITIVE DAMAGES ARE PUNISHMENT.

The starting point is recognition that punitive damages are a form of punishment. The Supreme Court of Mississippi admitted as much when it said that punitive damages are designed "to punish defendant and to provide a substantial deterrent to it and others similarly situated . . . ." App. A. at 50a. In other words, punitive damages serve purposes of retribution (repaying injury with injury) and deterrence, which are tradi-

[3] Thus, even if settlements are made in the face of such uncertainties, punitive damages claims often have an unjust, coercive effect.

tional rationales for punishment. They serve no other purpose. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("Retribution and deterrence are not legitimate nonpunitive governmental objectives."). Thus, punitive damages are a form of punishment and must be justified on that ground.

All this would be too obvious for mention were it not for the persistent misapprehension that *civil* sanctions somehow cannot count as punishment. This assumption is obviously wrong, and perhaps for that reason it is rarely defended. Nonetheless, the assumption that civil penalties are not really punishment pervades the debates over punitive damages. Some such assumption necessarily underlies the contention that constitutional scrutiny should be strictly confined to *criminal* sanctions.

But punishment does not necessarily become less harmful or less coercive simply because it is labeled "civil." The distinction between civil and criminal punishments is often a matter of form. Especially is this so where the defendant is a business entity and thus beyond the reach of the distinctively penal sanction of imprisonment. In the context of business entities, there is little real difference between civil and criminal regimes of regulation—both involve the use of pecuniary sanctions.[4]

Thus, the important functional distinction is not between civil and criminal punishment, but between compensation and punishment. Compensation involves the *allocation* of loss; punishment is the *creation* of loss. It is an intentional infliction of harm by the state. No society founded on the principle of limiting state power

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[4] This is not to deny, however, that there can be substantial adverse consequences, both in public image and indirect economic losses, that follow from this stigma of conduct labeled criminal. But that distinction is not relevant here.

can tolerate unconstrained punishment. And that is true whether the punishment is denominated civil or criminal. The potential abuses are the same.

It is not necessary to say punitive damages "are" criminal sanctions or that the law must treat them identically. One need not go so far. The important point here is that punitive damages are a form of punishment. The constitutional concerns that appropriately attend the infliction of punishment are not obviated by the label "civil." More extended analysis is required.

II. GROSSLY DISPROPORTIONATE PUNISHMENT IS UNCONSTITUTIONAL.

A fundamental constitutional principle is that punishment not be excessive—that is, that it not be grossly disproportionate to the nature of the misconduct. This principle is accepted in the criminal law, *see Solem v. Helm*, 463 U.S. 277 (1983), but there has been resistance to its application beyond that context. *See Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977).[5]

It is plain that the constitutional protection against excessive punishment is not concerned solely with criminal laws. Such a limitation would be unsupported by the text of the relevant constitutional provisions, inconsistent with the history underlying those provisions, and contrary to the fundamental purpose to protect life, liberty and property from arbitrary deprivation.

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[5] Note, however, that the *Ingraham* Court was careful not to state categorically that the various provisions of the Eighth Amendment could have no application outside the criminal context. Instead, the *Ingraham* Court merely adhered to the traditional focus of cruel-and-unusual-punishment cases and ruled that the Eighth Amendment did not apply to the paddling of school children. 430 U.S. at 671. That result is not drawn in question here.

Note also that the *Ingraham* Court explicitly contemplated that some punishments might be treated as criminal even though not so labeled. *Id.* at 669 n.37. That recognition disproves any intent to limit Eighth Amendment principles strictly to criminal sanctions.

A. Text.

The relevant constitutional texts are the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. Neither is limited to the criminal law.

The Due Process Clause states broadly: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const., amend. XIV, § 2. It contains no hint of limitation to the criminal law and has never been so construed.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The reference to "bail" evokes the criminal law, but neither "fines" nor "punishments" are necessarily criminal. Moreover, the absence of limiting language in the Eighth Amendment stands in telling contrast to other Bill of Rights provisions. The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous *crime*" without indictment by grand jury, and that no person shall "for the same *offence* . . . be twice put in jeopardy of life or limb; nor shall be compelled in any *criminal* case to be a witness against himself. . . ." U.S. Const., amend. V (emphasis added). The Sixth Amendment similarly specifies rights applicable to "all *criminal* prosecutions." U.S. Const., amend. VI (emphasis added). The Eighth Amendment, by contrast, speaks to the severity of punishment rather than to its characterization. There is no textual warrant for limiting this guarantee to the criminal law.

B. History.

The pre-constitutional history of the protection against disproportionate punishment was summarized in *Solem v. Helm*, 463 U.S. at 284-86, and has been elaborated

elsewhere. *See, e.g.*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154-57 (1986). In brief, it is the history of amercements—fines paid to the King to restore wrongdoers to the protection of the law. In Norman England, amercement was the usual penalty for a very broad range of delicts and offenses. These fines were assessed ad hoc and in potentially unlimited amounts. The resulting abuses led to inclusion in Magna Carta of three chapters devoted to the limitation of amercements. Chapter 20 provides in part: "A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense. . . ."[6] Here is an early and plain statement of the principle that financial punishment not be disproportionately severe.

As this Court acknowledged in *Solem*, the link between these provisions of Magna Carta and our Bill of Rights is direct and clear. 463 U.S. at 284-86. The protection against excessive amercements was carried forward in the First Statute of Westminster, 3 Edw. 1, ch. 6 (1275), and in the "excessive Fines" language of the English Bill of Rights, 1 Wm. & Mary sess. 2, ch. 2 (1689). *Id.* at 285. The language of the latter was used by George Mason in Art. I, § 9 of the Virginia Declaration of Rights (1776), which formed the basis for the Eighth Amendment. Moreover, and independently of the Eighth Amendment, the Due Process Clause of the Fifth Amendment has long been held to incorporate the fundamental liberties and protections secured by Magna

[6] W. McKechnie, *Magna Carta, A Commentary on the Great Chapter of King John*, 285 (2d rev. ed. 1914). The remainder of Chapter 20 extends the protection to merchants and villeins. Nobles and clergy are covered by Chapters 21 and 22, respectively. Thus Magna Carta's protection against excessive amercements extended to all segments of society.

Carta. *See, e.g., Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1855). Among those guarantees was the protection against excessive punishments.

C. Constitutional Purpose.

The lesson from text and history is amply confirmed by analysis of the purposes of these provisions. First, there can be no doubt that punitive damages are functionally civil fines. Like other fines, punitive awards impose monetary penalties on particularized assessments of fault. That the penalties are paid to private plaintiffs rather than to the state itself does not matter, for the Eighth Amendment was plainly intended to forbid excessive punishment, not government self-enrichment.

Moreover, there is nothing in logic or policy to suggest that the ban against excessive fines has particular application to the criminal law. The magnitude of punishment inflicted by a fine is chiefly a function of amount, not characterization. A civil fine can be every bit as "excessive" as a criminal fine, and should be equally objectionable.

Finally, it is important to recognize that the evil of excessive or disproportionate punishment is intimately related to the problem of arbitrary or standardless punishment. Although conceivable, it is very unlikely that any penalty specified by the legislature for across-the-board application would be unconstitutionally disproportionate. For one thing, the legislative judgment would itself be an important datum indicating an appropriate sanction. Moreover, the generality and impersonality with which legislative judgments are expressed would likely preclude gross excess.[7]

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[7] In some circumstances, however, the usual constraints of political accountability may fall short of protecting minority interests—a fact that the Framers recognized in the detailed articulation of constitutional restrictions on majority rule.

The evil of unconstitutionally excessive punishment is far more likely to arise where the penalty is assessed ad hoc. The lack of intelligible standards permitting disciplined comparison with other cases invites inconsistency and arbitrariness. Perhaps more importantly, the fact-specific context in which the penalty judgment is made increases the risk that reason will be inflamed by prejudice or derailed by caprice. This destructive synergy between arbitrariness and excess was part of the problem with amercements, as it is part of the problem with punitive damages. In both contexts, the prospect of excessive punishment is exacerbated by the ad hoc manner of its assessment.[8]

III. THIS PUNITIVE AWARD IS THEREFORE UNCONSTITUTIONAL.

The critical question therefore becomes: How does one determine that a given punitive award is grossly disproportionate and therefore unconstitutional? Of course, there is no constitutional requirement that a penalty match precisely some sort of ideal standard; there is only a limitation at the outer edge of reasonableness. Still, the question arises: How does one assess whether a given award has crossed that line?

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[8] The excessiveness of large punitive awards against corporate defendants is further exacerbated by the fact that the penalty is ultimately paid by innocent shareholders rather than by individual wrongdoers, if any, in the corporate hierarchy. In an analogous context, this Court held that punitive damages should not be assessed against municipalities sued under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The *Newport* Court carefully analyzed the effects of punitive damages against institutional defendants, and concluded that the purposes of retribution and deterrence are in any event better served by suits against responsible individuals rather than against their institutional employers. The reasoning of *Newport* is directly applicable here, and its confirms the folly of allowing arbitrarily large punitive awards against corporate shareholders.

Obviously, there is no self-executing test, but neither are the courts without meaningful guidance. In *Solem*, 463 U.S. at 290-92, this Court identified three objective criteria for assessing disproportionality in the criminal context. These criteria are not uniformly applicable here, but they do suggest analogous guidelines for the control of punitive damages in civil cases.

The first and most important of the *Solem* Court's criteria is the relation between the gravity of the offense and the harshness of the penalty. *See Solem*, 463 U.S. at 290-91. This must be the lodestar for determining the limits of an acceptable punitive award. Fortunately, in the context of punitive damages, this concept of a relation between the gravity of misconduct and the harshness of the penalty has a nearly exact meaning. That meaning derives from the relatively common statutory pattern of imposing treble damages for civil misconduct. *See* 15 U.S.C. § 15a (1982) (antitrust); 18 U.S.C. § 1964(c) (1982) (RICO).[9] The fact that legislatures, when faced with the analogous question of fixing appropriate penalties, so often choose a multiple of three suggests that figure as a sensible norm.

One need not go so far as to contend that nothing higher than three times compensatory damages can ever be sustained. The critical point is to recognize the utility of treble damages as a kind of benchmark. On the facts of this case, that criterion is dispositive. This is not a case involving a purpose to hurt, where a greater penalty might be justified. The punitive award entered here was not three times the compensatory judgment, but 80 times the compensatory judgment. On no account can so extravagant a penalty be maintained.

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[9] *See also*, 2 F. Pollock & F. Maitland, *The History of English Law* (2d ed. 1909), where it is noted that "under Edward I a favourite device of our legislators is that of giving double or treble damages to 'the party grieved'." *Id.* at 522.

The second *Solem* criterion requires comparison with sentences imposed on other criminals in the same jurisdiction. *See Solem*, 463 U.S. at 291. In the civil context, this factor suggests comparison of a punitive damages award with the level of fines authorized by the legislature as criminal penalties. The legislative specification of a permissible sanction when crime is proved should limit the permissible punishment when it is not. That a jury, instructed to seek a mere preponderance of the evidence, can impose a penalty greater than that which the legislature has authorized for proof beyond a reasonable doubt is surely wrong. Quite arguably, the maximum fine authorized as a criminal sanction in a given jurisdiction should place an absolute limit on punitive awards for analogous misconduct. At the very least, the criminal penalty provides a meaningful benchmark against which punitive awards can be measured.

The third *Solem* criterion concerns sentences authorized for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 291. In the context of punitive damages, this translates as a directive that punitive awards be compared to criminal fines in other jurisdictions, as well as in the forum. This factor broadens the inquiry somewhat but does not change its essential focus.

Under these three criteria, there can be no serious question that the punitive award sustained below is grossly excessive. Significantly, the majority below did not disagree. Rather than rely on the *Solem* criteria of disproportionality, the court below justified the award solely and exclusively on a factor having no analogue in *Solem* —the defendant's net worth. Because the punitive award was less than one percent of defendant's net worth, the majority concluded that the award could not "be said to shock the judicial conscience." App. at 52a.

This approach is wholly misguided. If Appellant is to be punished, it should be punished for the harm it caused,

not for the fact of being large. Status crimes have no place in the law, *Robinson v. California*, 370 U.S. 660 (1962), and neither does the defendant's status have any legitimate role in the award of punitive damages.

The usual justification for taking defendant's size into account is that it takes a big award to make a big defendant hurt. While this sort of talk has some superficial plausibility, it wholly misconceives the nature of the proportionality inquiry and its relation to the rule of law. In a nation governed by the rule of law, punishment must be predicated on specific misconduct. Put another way, the rule of law requires that citizens be punished only for what they do, not for who they are.

Requiring that the penalties not be grossly disproportionate to proved misconduct is one way of ensuring that the punishment is in fact based on specific misconduct and not on the defendant's identity or on some other extraneous or illegitimate factor. Thus, basing a huge punitive award solely on the defendant's net worth is directly destructive of the values that the constitutional constraints on severity of punishment are designed to serve.

Moreover, there is neither a retributive nor deterrent rationale for this approach. The fact that given misconduct is committed by a large corporation does not make it more harmful than the same misconduct committed by a small corporation or by an individual. Nor is a larger penalty necessary for purposes of deterrence. As a moment's reflection reveals, the size of the penalty needed for deterrence is determined by reference to the expected gain from the specific misconduct, not by reference to the defendant's other resources. To put the point simply, a penalty sufficient to make the expected cost exceed the expected gain will function as a deterrent. That will be true regardless of the actor's wealth, for a rich man is no more likely than a poor one to engage in misconduct

where the expected cost exceeds the expected gain. Whatever the appropriate sanction for purposes of deterrence, there is *nothing* in deterrence theory to support a larger fine for larger defendants.

The true reason for imposing a huge penalty on a large corporation, however, probably has nothing to do with specific misconduct. It likely results from the speculation that a large corporation has engaged in a *pattern* of misconduct, of which any given case is merely illustrative. If this assumption were proved, it would make good sense to heap up the penalties, for the punitive award would then redress a history of repetitive misbehavior rather than isolated misconduct.[10] The trouble is that here (and in most cases) no such pattern has been *proved* in a court of law. The speculation that a large defendant must have engaged in a large number of transgressions is just that—speculation. It is not supported by the evidence nor by any finding whatever.[11]

If the rule of law means anything at all, it surely must mean that punishment cannot be based on mere speculation. It must be grounded in proof of specific misconduct. It is by reference to that specific misconduct that the proportionality of punishment must be judged. Where the legislature has not acted to define the outer bound of pro-

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[10] But even in that circumstance, care would have to be taken to see that any such single award or multiple punitive damages awards do not have the effect of preventing satisfaction of valid claims by others for compensatory damages.

[11] Relying on a wholly unsubstantiated suspicion that a large defendant has engaged in a large pattern of misconduct is rather like convicting a criminal defendant based on the fact of repeated arrest. If a prosecutor were allowed to tell the jury of an accused's arrest record, the jury might well infer fire from smoke. For that very reason, the prosecutor is barred from such tactics. Similarly, a corporate defendant in a punitive damages case should not be subjected to huge penalties based on mere suspicion. Punishment should be confined to misconduct as proved in a court of law.

portionality, due process and the Eighth Amendment obligate judges to define those outer bounds where necessary to prevent arbitrary punishment. On these facts, there can be little doubt that the punitive award of $1,600,000 added to a compensatory judgment of only $20,000 is grossly disproportionate and hence unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

JOHN CALVIN JEFFRIES, JR.
University of Virginia
Law School
Charlottesville, Virginia 22901

GEORGE CLEMON FREEMAN, JR.
(Counsel of Record)
WILLIAM F. KENNEDY
HUNTON & WILLIAMS
P.O. Box 1535
Richmond, Virginia 23212
Counsel for *Amicus Curiae*

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No. 85-1765

In the Supreme Court of the United States

October Term, 1986

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN INSURANCE ASSOCIATION, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF APPELLANT

HORVITZ, LEVY & AMERIAN
*Ellis J. Horvitz
Michael R. Tyler
S. Thomas Todd
15760 Ventura Boulevard
18th Floor
Encino, California 91436
Telephone: (818) 995-0800 and (213) 872-0802

Attorneys for
THE ALLIANCE OF AMERICAN INSURERS,
THE AMERICAN INSURANCE ASSOCIATION, and
THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

**Counsel of Record*

Westside Law Publishers Los Angeles, California (213) 477-0491

No. 85-1765

In the Supreme Court of the United States

October Term, 1986

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN INSURANCE ASSOCIATION, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF APPELLANT

The Alliance of American Insurers, the American Insurance Association, and the National Association of Independent Insurers respectfully move for leave to file the brief amici curiae accompanying this motion. The consent of the attorney for appellant has been obtained and is being filed with the Court. The consent of the attorney for appellee was requested but refused.

The Alliance of American Insurers ("AAI") is a trade association of approximately 175 insurance companies writing property and casualty insurance throughout the United States.

AAI's member companies account for approximately 12 percent of the property and casualty insurance written in the United States.

The American Insurance Association ("AIA") is a national trade association of approximately 175 property and casualty insurance companies. AIA's member companies account for approximately 26 percent of the property and casualty insurance written in the United States.

The National Association of Independent Insurers ("NAII") is a national trade association of more than 500 property and casualty insurance companies. NAII members write nearly 22 percent of the property and casualty insurance in force in the United States.

Amici are concerned that the pervasive and growing availability of punitive damages and the geometric increase in the size of punitive awards in recent years threatens the capacity of the insurance industry to provide liability insurance to the public at an affordable cost.*

A constitutional challenge to punitive damages was raised in the Mississippi Supreme Court and in appellant's jurisdictional statement in this Court. Appellant relies primarily on the Excessive Fines Clause of the Eighth Amendment. We believe this Court may wish to consider other equally significant constitutional problems. Accordingly, in our brief we argue: (1) Punitive damages in reality constitute a criminal penalty; accordingly, the defendant is entitled to the same constitutional safeguards as in a criminal proceeding. (2) At the very least due process requires proof by clear and convincing evidence. (3) Due process also requires a bifurcated trial and explicit standards governing the amount of a punitive award.

Before discussing these issues, however, we briefly describe the dimensions of the punitive damage problem, presenting the results of a recent RAND Corporation study and our own

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*Rightly so, the insurance industry has been called the banker of the tort system.

study of punitive damage jury verdicts for $100,000 or more rendered by California juries during the ten-year period from January 1, 1976, through December 31, 1985.

Respectfully submitted,

HORVITZ, LEVY & AMERIAN

S. THOMAS TODD

Attorneys for
THE ALLIANCE OF AMERICAN INSURERS,
THE AMERICAN INSURANCE ASSOCIATION, and
THE NATIONAL ASSOCIATION
OF INDEPENDENT INSURERS

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No. 85-1765

In the Supreme Court of the United States

October Term, 1986

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN INSURANCE ASSOCIATION, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICI CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

See "Motion for Leave to File Brief, etc.," *supra.*

SUMMARY OF ARGUMENT

We briefly describe the dimensions of the punitive damage problem in terms of the rapidly growing number of punitive damage awards and the extraordinary increase in the size of these awards. Thereafter, we demonstrate: (1) Punitive damages in reality constitute a criminal penalty; accordingly, the defendant should be entitled to the same constitutional safeguards as in a criminal proceeding. (2) At the very least due process requires proof by clear and convincing evidence. (3) Due process also requires a bifurcated trial and explicit standards governing the amount of a punitive award.

ARGUMENT

I.

INTRODUCTION: THE DIMENSIONS OF THE PUNITIVE DAMAGE PROBLEM.

Punitive damages are an anomaly. They serve the same function as criminal penalties and are in effect private fines. *International Brotherhood of Electrical Workers v. Faust*, 442 U.S. 42, 48 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). Yet, unlike a criminal penalty, there usually is no statutorily-defined maximum[1] and many of the procedural protections afforded a criminal defendant are absent. In short, a civil defendant facing a punitive damage claim has much less to work with than if facing criminal prosecution, but frequently much more to lose—especially a corporate defendant like an insurance company.[2]

Until recent years the problems of inadequate procedural safeguards afforded a punitive damage defendant and the lack of meaningful standards to govern the amount of a punitive damage award have received less attention because "punitive damage awards occurred infrequently; their size, when they did occur, was relatively small; and, the cases in which they occurred involved, by and large, some of the most egregious

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[1]Recently, a few states have enacted statutory maximums for punitive awards. Colo. Rev. Stat. Ann. § 13-21-102 (Supp. 1986); Mont. Code Ann. § 27-1-221 (1986); Fla. Stat. Ann. § 768.73 (Supp. 1987); Okla. Stat. Ann. tit. 23, § 9 (1987). Only the Colorado ceiling is absolute; the others can be set aside under various circumstances.

[2]Since a corporate defendant cannot be imprisoned, the relevant comparison is to a monetary fine.

The majority of punitive damage awards are against businesses, not individuals. A recent RAND Corporation study of punitive damages, discussed *infra*, found that "[m]ost punitive damages awards in California were assessed against businesses, which constitute 57 percent of all defendants liable for punitive damages." Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings* viii (RAND Corp., Institute for Civil Justice, 1987) [hereinafter cited as RAND Study].

forms of intentional torts." 2 Ghiardi & Kircher, *Punitive Damages Law and Practice* § 21.01, at 1 (1985). Now, however, all this has changed. A punitive monster is growing on the civil side, and, unchecked by restraints on criminal penalties, it is reaching enormous proportions.

Appendix A lists the punitive damage jury verdicts for $100,000 or more rendered by California juries during the ten-year period from January 1, 1976, through December 31, 1985.[3] *The alarming trend in increased frequency and size of awards* will be obvious from even a quick perusal. The following chart summarizes the verdicts in these cases:

Year	No. $100,000+ Jury Verdicts	Sum of Verdicts
1976	7	$7,525,138
1977	9	$13,656,000
1978	14	$137,193,000[4]
1979	12	$35,415,815
1980	20	$35,116,500
1981	29	$27,375,710
1982	32	$54,861,096
1983	39	$109,405,254
1984	68	$59,342,317
1985	76	$362,494,739[5]

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[3]The source for the statistics is Jury Verdicts Weekly, Inc., *Jury Verdicts Weekly*, which compiles reports of jury verdicts in all California state and federal courts. *Jury Verdicts Weekly* does not purport to be a complete listing of every verdict in California, but it is recognized as an authoritative source of information concerning verdicts. The RAND Corporation used *Jury Verdicts Weekly* as the data base for its study of California punitive damage jury verdicts during the period 1980-1984. RAND Study at 4.

[4]One verdict, *Grimshaw v. Ford Motor Co.*, accounts for $125,000,000 of the total. Without *Grimshaw*, the total is $12,193,000. With *Grimshaw*, but using the amount accepted by the plaintiff pursuant to the trial court's remittitur ($3.5 million), the total is $15,693,000.

[5]One verdict, *Micro/Vest v. Computerland*, accounts for $125,000,000 of the total. Even without *Micro/Vest*, however, the

All told, during this ten-year period in California there were *109* punitive damage jury verdicts of *$1 million or more, 29* of them *$5 million or more, 16* of them *$10 million or more,* and *2* of them for *$125 million*! The verdicts rendered just during 1983, 1984 and 1985 account for 58 percent of all the $1 million-plus verdicts in the entire 10 years, 68 percent of the $5 million-plus verdicts, and 63 percent of the $10 million-plus verdicts. The year 1985 alone accounts for 25 percent of the $1 million-plus verdicts, 39 percent of the $5 million-plus verdicts, and 44 percent of the $10 million-plus verdicts.

The RAND Corporation's 1987 study of punitive damages[6] concluded two major changes have occurred in recent years. One, entirely consistent with the data we report above, is: "The largest punitive damage awards have increased greatly in size, sharply increasing both the average award and the total dollars awarded." RAND Study at ix. The other, based on RAND's analysis of punitive awards by type of case, is: "[P]unitive damages in business/contract cases have become far more significant: Both routine and extraordinary awards were larger and given more frequently." *Id.*

The business/contract category in the RAND study included bad faith claims against insurance companies, employers, and other businesses. *Id.*, at 8. The Study found:

> "In California, punitive damages for business/contract cases were led by awards in bad faith actions, which accounted for almost half of all dollars awarded as punitive damages in California between 1980 and 1984. Not only were growing numbers of

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total is still *$237,494,739.*

[6]The data for the RAND Study covered all civil jury trials in Cook County, Illinois, and San Francisco County, California, from 1960 to 1984, and all civil jury trials throughout California from 1980 to 1984. RAND Study at v.

damages awarded for bad faith, but those awards were much larger than in other business/contract cases." *Id.*, at vi.[7]

The actions of trial and appellate courts confirm that juries' punitive damage verdicts are frequently erroneous. Appendix B shows the results of the new trial motions in those cases included in Appendix A where the jury's punitive damage verdict was $1 million or more. In 104 of the 109 cases the trial court ruled on a new trial motion. A new trial was granted or the punitive award was remitted in 46 cases, or 44 percent of the time. Over 50 percent of the combined total amount awarded by these 104 juries was eliminated by the trial judges.[8] *The mere fact such a large percentage of punitive damages are remitted demonstrates current procedures are fundamentally flawed.*

Despite the frequency of remittitur, a great many seven-figure punitive damage awards have been affirmed on appeal.

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[7]The 109 cases listed in Appendix A where California juries awarded $1 million or more in punitive damages include the following awards in insurance bad faith cases:

$40,000,000	Fellows v. Allstate Ins. Co.
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.
13,054,479	Berk v. National Union Fire Ins. Co.
10,000,000	Stanton v. Continental Casualty Co.
8,500,000	Sykes v. Allstate Ins. Co.
8,000,000	Frazier v. Metropolitan Life Ins. Co.
7,163,340	Tidwell v. Republic Ins. Co.
7,000,000	Hronis v. Liberty Mutual Ins. Co.
5,300,000	Austero v. Washington National Ins. Co.
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.
5,000,000	Sprague v. Equifax, Inc.
5,000,000	Bertolani v. Equitable Life Assurance Society

Twenty-two more insurance bad faith cases had punitive awards between $1 million and $5 million.

[8]If the $125 million punitive damage verdict in *Micro/Vest v. Computerland,* where the new trial motion was denied, is excluded, the trial judges eliminated over 60 percent of the juries' combined total awards.

Just those against insurance companies include: *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520 (11th Cir. 1985) (Fla. law) ($2.1 million); *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556 (11th Cir. 1983) (Ala. law) ($1.5 million); *Nationwide Mut. Ins. Co. v. Clay*, 469 So.2d 533 (Ala. 1985) ($1.25 million); *Hawkins v. Allstate Ins. Co.*, ___ *Ariz.* ___, ___ P.2d ___ (1987) ($3.5 million); *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127, *cert. denied*, 459 U.S. 1070 (1982) ($3 million); *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal.App.3d 1072, 234 Cal.Rptr. 835 (1987) ($5 million); *Sprague v. Equifax, Inc.*, 166 Cal.App.3d 1012, 213 Cal.Rptr. 69 (1985) ($1 million); *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984) ($3 million); *Moore v. American United Life Ins. Co.*, 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984) ($2.5 million); *Pistorius v. Prudential Ins. Co.*, 123 Cal.App.3d 541, 176 Cal.Rptr. 660 (1981) ($1 million); *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982) ($1.5 million).

To impose penal sanctions of this magnitude using the same procedural safeguards as in run-of-the-mill automobile negligence cases is wrong. This Court's willingness to consider the constitutional issues posed by punitive damages comes none too soon.

II.

PUNITIVE DAMAGES ARE SO PUNITIVE IN PURPOSE AND EFFECT AS TO CONSTITUTE A CRIMINAL PENALTY; ACCORDINGLY, THE DEFENDANT SHOULD BE ENTITLED TO THE SAME PROCEDURAL PROTECTIONS AND RESTRICTIONS AVAILABLE IN A CRIMINAL PROSECUTION.

A. A Sanction Which Is Penal In Purpose Or Effect Is Considered A Criminal Penalty.

The distinction between a civil penalty and a criminal penalty is constitutionally significant. *United States v. Ward*, 448 U.S. 242, 248, *reh'g denied*, 448 U.S. 916 (1980). When a state

sanctions a defendant "for the purpose of punishment" rather than as "an incident of some other legitimate governmental purpose," *Bell v. Wolfish*, 441 U.S. 520, 538 (1979), i.e., unless the penalty is a "remedial civil sanction," *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362, 366 (1984), due process requires the procedural protections and restrictions available in criminal prosecutions. *Ward*, 448 U.S. at 248-49; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). This is true even when the penalty takes the form of an economic sanction. *Ward*, 448 U.S. at 245-51. So long as it is designed primarily to punish, a fine or other economic sanction may not be imposed without according the defendant the procedural safeguards available in criminal cases. *Id.*, at 248-51.

Whether a penalty imposed by statute is criminal or civil (i.e., whether it is primarily designed to punish or to serve a remedial purpose) is a matter of both legislative intent and statutory purpose or effect. As explained in *Ward*, 448 U.S. at 248-49:

> "Our inquiry . . . [into whether a penalty is civil or criminal] has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [Citation.] Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was *so punitive either in purpose or effect* as to negate that intention. [Citation.] In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.' " (Emphasis added.)

Accord Allen v. Illinois, ___ U.S. ___, 106 S.Ct. 2988, 2992, 92 L.Ed.2d 296, 304 (1986); *One Assortment of 89 Firearms*, 465 U.S. at 362-63.

In Mississippi, punitive damages are a judicially-created doctrine; thus, it is the Mississippi Supreme Court's intention

to establish a civil or criminal penalty that is at issue. We are unaware of any case where that court has expressly stated punitive damages are civil rather than criminal in nature. At most, an intention to establish a civil penalty is implicit in its decisions. The key question, then, is whether punitive damages in Mississippi are "so punitive in purpose or effect" as to negate any such implied intention to establish a civil penalty.

B. Punitive Damages Are Penal In Purpose.

The Mississippi Supreme Court consistently has explained the purpose of punitive damages is to *punish* and *deter*. *E.g., Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 268-69 (Miss. 1985) ("Punitive damages are in addition to actual damages, and are in the nature of punishment for the wrongdoing of the defendant, and to set an example so as to deter others from similar behavior. [Citation.] [¶] The basis in awarding such damages is to reward a plaintiff for public service in bringing the wrongdoer to account"); *State Farm Mut. Auto. Ins. Co. v. Daughdrill*, 474 So.2d 1048, 1052 (Miss. 1985) ("The purpose of punitive damages, as often stated by this Court, is to punish a tortfeasor"); *Tideway Oil Programs, Inc. v. Serio*, 431 So.2d 454, 460 (Miss. 1983) ("The accepted theory is that exemplary or punitive damages may be imposed as a punishment upon the wrongdoer, as a restraint on the transgressor. . . . What is otherwise a windfall is deemed necessarily granted to the plaintiff as his reward for public service in bringing the wrongdoer to account"); *Standard Life Ins. Co. of Indiana v. Veal*, 354 So.2d 239, 247 (Miss. 1977); *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 151, 141 So.2d 226 (1962) ("We have said 'Punitive damages are punishing damages . . .' "); *Yazoo & Miss. Valley Railroad Co. v. Hardie*, 100 Miss. 132, 146, 55 So. 42 (1911) ("If the law considered only the individual no punitive damage would be allowed. . . . Such damage is allowed for the public good, and for the purpose of deterring others from like offenses"); *Bell v. Morrison*, 27 Miss. 68, 84 (1854); *accord City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by

definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"); *Electrical Workers*, 442 U.S. at 48 ("Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence' "); *Gertz*, 418 U.S. at 350 (same); *Rosenbloom*, 403 U.S. at 82 (Marshall, J., dissenting) ("Today these damages are rationalized as a way to punish the wrongdoer and to admonish others not to err. . . . Thus they serve the same function as criminal penalties and are in effect private fines").

As this Court recognized in *Bell v. Wolfish*, 442 U.S. at 539 n.20: "Retribution and deterrence are *not* legitimate nonpunitive governmental objectives." (Emphasis added.) Accordingly, to borrow the Court's language in *Kennedy* (divestiture of citizenship for leaving the United States to avoid the military draft is punishment): "If the sanction . . . is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U.S. at 167.

C. Punitive Damages Are Penal In Effect.

Even if the punitive purpose of punitive damages were not so obvious, under *United States v. Ward* consideration must be given to punitive effect. In examining this issue we "refer to the seven considerations listed in Kennedy v Mendoza-Martinez. . . ." *Ward*, 448 U.S. at 249; *accord One Assortment of 89 Firearms*, 465 U.S. at 365. In *Kennedy*, 372 U.S. at 168-69, the Court set forth the following factors relevant to determining whether a sanction is penal or regulatory in effect:

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether

> the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . ." (Footnotes omitted.)

We are aware these criteria are "neither exhaustive nor conclusive on the issue." *Ward*, 448 U.S. at 250. Nevertheless, as we now demonstrate, the *Kennedy* criteria strongly point to punitive damages in Mississippi being penal rather than merely remedial in effect.[9]

1. Punitive damages involve an affirmative disability or restraint.

In *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 518 F.2d 990, 1001 (5th Cir. 1975), *affd. on other grounds*, 430 U.S. 442 (1977), the Court of Appeals concluded this criterion gave "some weight" to the argument that a fine imposed for violating OSHA Safety Standards is a criminal penalty "because even though monetary penalties do not fit within the conventional definition of disability, i.e., want of legal capability, they do inflict a pocket-book deterrence or restraint on the recipient." (Footnote omitted.) Since punitive damages constitute " 'private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence,' " *Electrical Workers*, 442 U.S. at 48, they necessarily also constitute a "pocket-book deterrence or restraint" under this reasoning. When the growing number of punitive damage

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[9]In Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const.L.Q. 241 (1985), the seven *Kennedy* criteria are exhaustively analyzed in the context of punitive damages. The author concludes: "Punitive damages occupy a unique position in American jurisprudence, a punishment mechanism properly belonging to, but nevertheless evading, the criminal justice system." (*Id.*, at 241.) "When the punitive damages concept is analyzed . . . the conclusion is inescapable that they are penal in nature, spirit, and jurisprudence, and thus mandate higher standards of procedural protection." (*Id.*, at 247.) We commend Grass's analysis to this Court.

awards and the extraordinary increase in the size of these awards is considered, it is apparent that the impact of this particular form of pocket-book "restraint" is far more significant than that of any known fine.[10]

In addition to constituting a powerful monetary restraint, punitive damages impose a form of "disability" because of the associated stigma. As Professor Wheeler explains:

> "The word 'punitive,' denoting punishment for wrongdoing, is used to describe the award. Courts have stated that punitive damages awards represent the community's condemnation of 'reprehensible conduct' and express 'social condemnation and disapproval.' Thus, a punitive damages award, unlike a compensatory award, seems always to constitute a 'badge of disgrace' and to jeopardize the defendant's good name, reputation, honor, and integrity." Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269, 282 (1983).

In Mississippi, "Punitive damages may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." *Bankers Life & Cas. Co.*, 483 So.2d at 269. " 'In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing *ruthless disregard for the rights of others*, so as to take the case out of the ordinary rule.' " *Veal*, 354 So.2d at 247 (emphasis added); *accord Fowler Butane Gas Co. v. Varner*, 244 Miss. at 150 ("injuries inflicted in the spirit of wanton disregard for the rights of others"). Certainly, there is stigma associated with a finding of "ruthless disregard for the rights of others."

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[10]The usual maximum fine permitted under Mississippi law for commission of a felony is $10,000. Miss. Code Ann. § 99-19-32 (Supp. 1986). For "offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed," the maximum fine is $1,000. Miss. Code Ann. § 99-19-31 (Supp. 1986).

Moreover, since our study of punitive damage jury verdicts for $100,000 or more during the ten years from 1976 through 1985 revealed almost all were against corporations or other businesses, Appendix A, and the RAND Study also found a majority of punitive damage awards are against businesses, not individuals, RAND Study at viii, the relevant comparison is to the stigma associated with criminal conviction of a corporation. In this context, the stigma associated with punitive damages is very similar to that associated with a criminal conviction.

> "[C]orporations, which have borne most of the burden of punitive damages in recent years, never face most of the nonmonetary costs of a criminal conviction. The government obviously cannot imprison a corporation. Corporations have few civil rights to lose; nor do they submit any job applications. Therefore, when convicted of a crime, a corporate defendant incurs [nonmonetary] costs that are quite similar to those it incurs when forced to pay punitive damages." Wheeler, *supra,* at 284.

In sum, the ever-increasing odds of a huge punitive award, the *staggering* sums being awarded, and the stigma associated with punitive damages all point to the conclusion that punitive damages involve an affirmative disability or restraint under the first *Kennedy* criterion.

2. Punitive damages historically have been regarded as punishment.

Punitive damages in Mississippi always have been regarded as punishment. In 1854 the Mississippi Supreme Court said:

> "It is settled by authorities almost without exception, in England and in the United States, that in actions for injuries to the person or to the character, the jury are not restricted, in giving damages, to the actual, positive injury sustained by the plaintiff, but may give damages *as a punishment against the defendant*; that not only may the plaintiff receive

> compensation for the injury inflicted upon him, but that the interest of society may be regarded, and such damages may be awarded as will tend to operate by way of example, and to deter others from similar acts of violence and oppression." *Bell v. Morrison,* 27 Miss. at 84 (emphasis added).

3. Punitive damages come into play only on a finding of scienter.

In Mississippi, " 'Punitive damages may be recovered for a *willful and intentional* wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong.' " *Veal,* 354 So.2d at 247 (emphasis added). Obviously, this mental state is even more culpable than scienter, which is merely acting with the intent to do the proscribed act without reference to its effect on others, *Atlas Roofing Co.,* 518 F.2d at 1001-02.

> "The inquiry [for punitive damages] concerns what level of reprehensibility the defendant achieves by his behavior. As with a criminal defendant, this question controls when and to what degree the defendant will be punished. . . . Requiring unity of act and intent to justify the infliction of punitive sanctions replicates criminal theory." Grass, *supra,* at 278.

4. Punitive damages promote the traditional aims of punishment.

As evidenced by the authorities cited above under our discussion of punitive purpose, punitive damages promote retribution and deterrence, the traditional aims of punishment. E.g., *Electrical Workers,* 442 U.S. at 48.

> "[U]nlike anything else in tort law, punitive damages are not assessed for injuries but are geared to the reprehensibility of the actor's behavior. No purer method of retribution and deterrence exists, with the exception of criminal law." Grass, *supra,* at 288.

5. Behavior resulting in punitive damages often is criminal as well.

The specific behavior about which appellee complains may not be a crime in Mississippi. *But see* Miss. Code Ann. § 83-5-33 (1972). In general, however, behavior resulting in punitive damage awards often is criminal as well. "Even where the behavior qualifying for punishment has not been classified as criminal conduct, punitive damages vindicate breaches of social duties that the defendant owes to the public as a whole." Grass, *supra,* at 293. Like criminal law, the focus of punitive damages in Mississippi is on the public interest. *E.g., Yazoo,* 100 Miss. at 146. Accordingly, the fifth criterion points in the direction of punitive damages constituting a criminal penalty.

6. Punitive damages serve no purpose other than punishment and deterrence.

As explained above, Mississippi law ascribes punishment and deterrence as the sole purpose of a punitive damage award. The Mississippi cases explain that the punitive award goes to the plaintiff as a "reward . . . for public service in bringing the wrongdoer to account." *Bankers Life & Cas. Co.,* 483 So.2d at 269. Awarding the punitive damages to the plaintiff as an incentive to sue is in furtherance of the retributive goal.[11]

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[11]In contrast, treble damages awarded to private individuals under the federal antitrust laws are considered a remedial civil sanction. *See Porter v. Household Finance Corp. of Columbus,* 385 F.Supp. 336, 341 (S.D. Ohio 1974), collecting cases. "Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury. '. . . Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing . . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, *and measures the awards by a multiple of the injury actually proved,* is designed primarily as a remedy.' " *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. ___, ___, 105 S.Ct. 3346, 3359, 87 L.Ed.2d 444, 460-61 (1985) (emphasis added); *accord American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556, 574-76 (1982); *Reiter v. Sonotone Corp.,* 442 U.S. 330, 343-44 (1979).

7. Even assuming punitive damages served an alternate purpose (they do not), they would be excessive in relation to any such purpose.

The proliferation of huge punitive damage awards discloses a pattern of excess unrelated to any legitimate purpose. For example, in the present case a $1.6 million punitive award is far beyond anything justifiable when the actual injury is worth only $20,000.[12] As this Court put it in *Bell v. Wolfish* (restrictions and conditions accompanying pretrial detention are not punishment):

> "[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." 441 U.S. at 539 n.20.

In sum, punitive damages in Mississippi unquestionably are penal in both purpose and effect. When the civil law inflicts punishment through punitive damages it acts as the surrogate

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[12]If the objective of an award of punitive damages against an insurance carrier is really to regulate unfair claims practices and only incidentally to punish the carrier, one certainly would expect that the more serious the unfair claims practice the greater the award of punitive damages. Not so. Unlike treble damages in an antitrust case, which are a multiple of the actual damages awarded and thus small in sum where little harm is caused by the defendant's anticompetitive conduct and large where the harm is great, punitive damages against an insurer are awarded without regard to the actual harm caused by the insurer's conduct. Where the "unpleasant consequences," *Flemming v. Nestor*, 363 U.S. 603, 614, *reh'g denied*, 364 U.S. 854 (1960, are measured by the insurer's conduct and state of mind, not by the amount of harm the insurer caused, it is difficult to contend the primary focus is on "regulation of a present situation," *id.*, rather than punishment for past activity. Punitive effect is paramount and regulatory effect incidental.

of the criminal law. Accordingly, a defendant facing punitive damages should be entitled to the same constitutional safeguards as a defendant in a criminal proceeding, including proof beyond a reasonable doubt,[13] protection against double jeopardy,[14] the privilege against self-incrimination,[15] and a unanimous verdict by six-person juries and a majority of ten for twelve-person juries.[16]

III.

ASSUMING *ARGUENDO* THAT PUNITIVE DAMAGES ARE NOT SO PUNITIVE IN PURPOSE OR EFFECT AS TO CONSTITUTE A CRIMINAL PENALTY (THEY CLEARLY ARE), DUE PROCESS REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE.

A. This Court Has Used The Three Factors In *Mathews v. Eldridge* To Determine If Due Process Requires Proof By Clear And Convincing Evidence.

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property . . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

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[13]*In re Winship*, 397 U.S. 358, 364 (1970).

[14]United States Constitution, 5th Amendment. Protecting punitive damage defendants against double jeopardy is particularly significant "in products liability and other mass tort cases, where punitive damages may be repetitively invoked against a single course of conduct in unfair and potentially ruinous aggregation." Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va.L.Rev. 139, 139 (1986). *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Ford.L.Rev. 37 (1983).

[15]United States Constitution, 5th Amendment.

[16]*Burch v. Louisiana*, 441 U.S. 130, 136 (1979). Mississippi requires a unanimous twelve-person jury in criminal cases. *Markham v. State*, 209 Miss. 135, 46 So.2d 88 (1950).

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

These *Eldridge* factors have been used by this Court to determine whether due process requires proof by clear and convincing evidence in particular circumstances. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held clear and convincing evidence is required to extinguish the parent-child relationship, and in *Addington v. Texas*, 441 U.S. 418 (1979), the Court held clear and convincing evidence is required to involuntarily commit a person to a mental hospital.[17]

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[17]Other cases where the Court has held the "clear and convincing" standard or one of its variants is the appropriate standard of proof are *Colorado v. New Mexico*, 467 U.S. 310, 315-16 (1984) (water rights disputes between states); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), and *Gertz*, 418 U.S. at 350 (defamation actions brought by (1) public officials; (2) public figures; and (3) private individuals seeking presumed or punitive damages where defamatory statements involve matters of public concern); *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 285-86 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 159 (1943) (denaturalization). In *Vance v. Terrazas*, 444 U.S. 252, 266-67 (1980), the Court said its deportation and denaturalization decisions were not constitutionally-compelled.

B. Under The *Eldridge* Test, Clear And Convincing Evidence Is Required To Prove Entitlement To Punitive Damages.[18]

1. The private interests affected by punitive damage awards — the enormous economic impact of such awards and the associated stigma — are commanding.

We described these interests in our discussion of the seven *Kennedy* criteria and will not repeat that discussion here. The important point is this: Our contention that due process requires the "clear and convincing" standard of proof cannot be discounted merely because one of the interests at stake is monetary. The monetary interest when a defendant, especially a corporate defendant, faces a claim for punitive damages is *wholly different from any other monetary interest known to law.* The ever-increasing odds in favor of a punitive award and the staggering sums being awarded mandate a higher burden of proof than that used for run-of-the-mill automobile negligence actions.[19]

The importance of the stigma factor was acknowledged in *Addington v. Texas*:

> "One typical use of the [clear and convincing] standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the

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[18]Wheeler, *supra*, thoroughly discusses the *Eldridge* test in the context of punitive damages and concludes: "[P]unitive damages defendants are entitled to . . . proof by clear and convincing evidence as to the substantive basis for a punitive damages award . . . ." (*Id.*, at 351.) As with Grass's analysis of the seven *Kennedy* criteria, we commend Professor Wheeler's article to this Court.

[19]For this reason, language in *Santosky*, quoting *Addington*, downplaying the significance of the monetary interest at stake in a typical "civil dispute over money damages," 455 U.S. at 755, should not be controlling.

> risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." 441 U.S. at 424.

In *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 457-58 (1980), the Wisconsin Supreme Court held that entitlement to punitive damages must be proved by clear and convincing evidence because of the stigma factor.

In short, the interests affected by punitive damages are "sufficiently grave to warrant more than average certainty on the part of the factfinder," *Santosky*, 455 U.S. at 758.

2. The risk the jury will erroneously deprive the defendant of its property and good name is extremely high and greatly outweighs the risk to the plaintiff of an erroneous denial of punitive damages.

In *Santosky*, the Court discussed the factors which "combine to magnify the risk of erroneous factfinding [in a parental neglect proceeding]." 455 U.S. at 762. At least two of these factors are directly relevant to punitive damages.

First, the *Santosky* court noted that "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." 455 U.S. at 762. Similarly, as we explain in detail in the next section of this brief, the standard for determining the amount of a punitive damage award is vague—so vague, in fact, as to be unconstitutional. The standard used in Mississippi is: "that amount reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant." *Bankers Life & Casualty Co.*, 483 So.2d at 278. Jurors considering this vague standard cannot possibly avoid decisions based on subjective values. *See City of Newport*, 453 U.S. at 270 ("The Court has remarked elsewhere on the broad discretion traditionally accorded to juries in assessing the amount of

punitive damages"); *Electrical Workers,* 442 U.S. at 50 ("Because juries are accorded broad discretion both as to the imposition and amount of punitive damages [citations], the impact of these windfall recoveries is unpredictable and potentially substantial"); *Gertz,* 418 U.S. at 350.

Moreover, and most significantly, "*jurors imposing discretionary punitive damages have no statutorily specified maximum* that limits the extent to which they may err in setting penalties." Wheeler, *supra,* at 286 (emphasis added); *see Rosenbloom,* 403 U.S. at 82-83 (Marshall, J. dissenting) ("Unlike criminal penalties . . . punitive damages are not awarded within discernible limits, but can be awarded in almost any amount. . . . The manner in which unlimited discretion may be exercised is plainly unpredictable").

Second, the *Santosky* court observed that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups [citation], such proceedings are often vulnerable to judgments based on cultural or class bias." 455 U.S. at 763. Similarly, the inherent prejudices many jurors have against large and wealthy corporate defendants, particularly insurance companies, cannot be gainsaid. *See* Morris, *Punitive Damages in Tort Cases,* 44 Harv.L.Rev. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare"); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U.Chi.L.Rev. 1, 11 (1982) ("many persons are hostile toward major institutions in general and 'big business' in particular"); Ellis, *Fairness and Efficiency in the Law of Punitive Damages,* 56 So.Cal.L.Rev. 1, 42-43, 52-53 (1982) ("the biases and inclinations toward wealth redistribution exhibited by triers of fact are permitted to influence decisions on punitive damage issues. Accordingly, there is little reason to believe that only deserving defendants are punished" (at 53)); *City of Newport,* 453 U.S. at 270. "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *Electrical Workers,* 442 U.S. at 50 n.14; *see Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J.,

dissenting) ("punitive damages are frequently based upon the caprice and prejudice of jurors").

In addition to the magnified risk of an erroneous jury verdict where punitive damages are concerned, the relative harm suffered by the plaintiff and the defendant when error occurs must be considered. *See Santosky*, 455 U.S. at 765-66. This consideration is *overwhelming* where punitive damages are concerned. Since punitive damages in Mississippi are not intended to compensate the plaintiff for any loss, i.e., the plaintiff's actual damages fully compensate for the injuries sustained, punitive damages constitute a total windfall to the plaintiff. An erroneous failure to award punitive damages is, therefore, of no legitimate significance to the plaintiff.

> "[T]he plaintiff . . . has little or no legitimate personal interest in a correct result. As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff." Wheeler, *supra*, at 292; *see Yazoo*, 100 Miss. at 146.

In contrast, the defendant has very real and substantial interests at stake, i.e., the potentially enormous economic impact of an erroneous punitive award and the associated stigma. "If punitive damages are imposed improperly, or in an excessive amount, the defendant suffers far more than a plaintiff does if the jury incorrectly fails to impose them." Wheeler, *supra*, at 292. Accordingly, by no stretch of the imagination can it be said the risk of error should fall equally on the two. "To reflect this imbalance, the burden of proof should favor the defendant more than does the 'preponderance of evidence test.' " *Id.*, at 298.

The gross disparity in harm if there is an error was the consideration which led the Indiana Supreme Court to hold that entitlement to punitive damages must be proved by clear and convincing evidence. *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982).

It is no answer to the magnified risk of erroneous jury verdicts in punitive damage cases, and the gross disparity in harm if an erroneous verdict occurs, to say the erroneous verdict can be corrected by the trial judge or on appeal. "Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard." *Santosky*, 455 U.S. at 757 (footnote omitted). "Nor has the Court treated appellate review as a curative for an inadequate burden of proof." *Id.*, at 757 n.9.

The *Eldridge* test also requires consideration of "the probable value, if any, of additional or substitute procedural safeguards." *Eldridge*, 424 U.S. at 335. "Raising the standard of proof would have both practical and symbolic consequences."[20] *Santosky*, 455 U.S. at 764. " 'Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate' [awards will be rendered]." *Id.*, at 764-65; *see* Wheeler, *supra*, at 298.

3. The state has no substantial interest in continuing to allow the imposition of punitive damages under the preponderance of the evidence standard.

As this Court has put it, "[T]he States . . . have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz*, 418 U.S. at 349. To the contrary, it is in the state's interest to bring punitive damages under control because "[p]revailing punitive damages procedures make overdeterrence likely." Wheeler, *supra*, at 307.

With seven-figure punitive awards against insurance companies being rendered by juries and affirmed by appellate courts, there has to be a substantial "shadow effect" at work, i.e., the potential for such huge awards impacts settlement of

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[20]Evidence is "clear and convincing" if it creates "an abiding conviction" that the truth of the factual contention is "highly probable." *Colorado v. New Mexico*, 467 U.S. at 316.

all insurance claims. But it is undesirable from a social utility perspective for insurers to become gun-shy in performing the legitimate, indeed essential task of screening and evaluating claims. To the extent insurers pay claims which should not have been paid, or pay more than should have been paid, in order to avoid the potential of punitive liability, the result, of course, is an increase in insurance premium rates. It is common knowledge it is rapidly becoming more and more difficult to find affordable liability insurance. Various tort reforms are being proposed to cope with the growing crisis by reducing insurers' costs. Obviously, runaway punitive damage awards against insurance carriers, to the extent they result in increased payment of nonmeritorious claims and overpayment of legitimate claims, are a step in the wrong direction. There is a very real public policy interest in seeing to it the pendulum does not swing too far against the insurance industry.

Under the *Eldridge* test, consideration of the state's interest also includes "the fiscal and administrative burdens that the . . . substitute procedural requirement would entail." *Eldridge*, 424 U.S. at 335. Changing the burden of proof in punitive damages cases would entail only nominal fiscal or administrative burdens for the state. The only burden is the cost of bifurcated trials in cases where punitive damages are sought. In part IV of this brief, *infra*, we discuss the need for bifurcation to avoid jury confusion over the differing standards of proof for compensatory and punitive damages. However, bifurcation poses no real burden. Wheeler, *supra*, at 321, 322 n.198.

In sum, all three *Eldridge* factors strongly point to the conclusion that to award punitive damages using the preponderance of the evidence standard is a violation of due process. Clear and convincing evidence should be required.[21]

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[21]In addition to the decisions of the Indiana and Wisconsin Supreme Courts mandating the clear and convincing standard in punitive damage cases, *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349; *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, the Maine Supreme Court recently did the same, *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1986) ("The potential consequences of a

IV.

DUE PROCESS REQUIRES A BIFURCATED TRIAL TO AVOID JURY CONFUSION AND PREJUDICE TO THE DEFENDANT.

Whether the higher burden of proof for punitive damages is "clear and convincing" or "beyond a reasonable doubt," either is very different from the preponderance of the evidence standard used to determine liability for compensatory damages. Professors Ghiardi and Kircher explain the problem this poses:

> "If the claims for compensatory and punitive damages are tried together the jury will be asked to weigh evidence that is being received simultaneously, by different standards. It is clear that such a situation will create confusion and uncertainty in the minds of the jury with the result that these different burdens of proof will be misapplied." 1 Ghiardi & Kircher, *supra,* § 12.04, at 12-13.

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punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence"). The Arizona Supreme Court has done so as well. *Linthicum v. Nationwide Ins. Co.,* 150 Ariz. 326, 723 P.2d 675, 680-81 (1986) ("When punitive damages are loosely assessed, they become onerous not only to defendants but the public as a whole").

Several other states require clear and convincing evidence by statute. Alaska Stat. § 09.17.020 (Supp. 1986); Minn. Stat. Ann. § 549.20 (Supp. 1987); Mont. Code Ann. § 27-1-221(2) (1986); Or. Rev. Stat. Ann. § 30.925 (1983). Oklahoma requires clear and convincing evidence if punitive damages exceed the amount of actual damages awarded. Okla. Stat. Ann. tit. 23, § 9 (1987). Florida requires clear and convincing evidence if punitive damages exceed three times the amount of compensatory damages. Fla. Stat. Ann. § 768.73 (Supp. 1987). Colorado requires proof beyond a reasonable doubt. Colo. Rev. Stat. Ann. § 13-25-127(2) (Supp. 1986).

In February 1987 the American Bar Association House of Delegates adopted a recommendation that "the standard of proof to be applied [for punitive damages] should be 'clear and convincing' evidence as opposed to any lesser standard such as 'by a preponderance of the evidence.' " American Bar Association House of Delegates, Report of Action Taken at 1987 Midyear Meeting.

Accord Wheeler, *supra*, at 301. The solution is a bifurcated trial—separating plaintiff's punitive damages claim from the compensatory damages issues. Wheeler, *supra,* at 321; *accord* 1 Ghiardi & Kircher, *supra*, § 12.04, at 12-13.

A bifurcated trial where punitive damages are concerned is essential for another reason. There is a serious problem of prejudice to the defendant when the jury is allowed to hear evidence of wealth and malice, relevant only to punitive damages, before making its determination on liability for compensatory damages. Professor Wheeler decries "the fact that, before deciding the liability and compensatory damages issues, the jury hears evidence that is relevant only to the punitive damages issues and that may cause the jury to resolve other issues adversely to the defendant." Wheeler, *supra,*, at 285; *see id.*, at 291. Professors Ghiardi and Kircher concur. 1 Ghiardi & Kircher, *supra*, § 12.04, at 10.

The prejudicial impact of allowing evidence of defendant's wealth to go to the jury before liability for compensatory damages is determined was discussed by Professor Clarence Morris in an article written in 1931:

> "[I]t is probable that this very evidence, instead of aiding the jury to assess a proper verdict, may prejudice them against the defendant and prevent an impartial judgment, not only on the size of the verdict, but in deciding who shall win the case. It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare." Morris, *supra,* at 1191 (emphasis added).

Today, it is readily apparent from the enormous punitive damage verdicts against corporate defendants (see Appendix A), verdicts which so frequently must be reduced by judges and appellate courts (see Appendix B), that juries probably are interested in divesting vested interests. There is every indication that evidence of wealth has turned out to be a source of injustice, as Professor Morris feared.

When the strong likelihood of jury confusion engendered by different proof standards for compensatory and punitive damages is added to the pre-existing problem of the prejudicial impact of evidence of wealth on the jury's determination of liability for compensatory damages, the case for bifurcation is compelling.[22]

V.

NO MEANINGFUL STANDARD GOVERNS THE AMOUNT OF A PUNITIVE PENALTY; ACCORDINGLY, THE PENALTY IS UNDULY VAGUE IN VIOLATION OF DUE PROCESS.

This Court has recognized that "[i]n most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Gertz,* 418 U.S. at 350; *see* Wheeler, *supra,* at 285. This assessment certainly holds true in Mississippi.

Mississippi law provides no fixed standard by which jurors may compute the amount of a punitive award; instead, it merely "authorize[s] a quantum of punitive damages to be that amount reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from

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[22]In February 1987 the American Bar Association House of Delegates adopted the following recommendation: "Evidence of net worth and other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined." American Bar Association House of Delegates, Report of Action Taken at the 1987 Midyear Meeting, *supra.*

The Mississippi Supreme Court has strongly suggested that trial courts should exercise their discretion to bifurcate the punitive damage issue. *State Farm Fire and Cas. Co. v. Simpson,* 477 So.2d 242, 254 (Miss. 1985).

the commission of similar offenses, all consistent with the pecuniary ability and financial worth of the defendant." *Bankers Life & Cas. Co.*, 483 So.2d at 278. In accordance with this free-wheeling "standard," the jurors in this case were instructed that they "may take into account the financial status of the defendant" in computing a punitive award. [Record on appeal at 1130-31 (Instruction No. P-19A).] This is *all* the jurors were told on this subject.

A forthright analysis of the Mississippi "standard" leads inexorably to the conclusion it is unconstitutionally vague. The "void for vagueness" doctrine requires government to:

> "articulate its aims with a reasonable degree of clarity [to] ensure[ ] that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduc[ing] the danger of caprice and discrimination in the administration of the laws, enabl[ing] individuals to conform their conduct to the requirements of law, and permit[ting] meaningful judicial review." *Roberts v. United States Jaycees*, 486 U.S. 609, 629 (1984).

The vagueness doctrine has application to standards for determining a penalty as well as for determining liability. *United States v. Batchelder*, 442 U.S. 114, 123 (1979). And the doctrine applies to civil as well as criminal statutes. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966.)[23]

Prevention of arbitrary and discriminatory enforcement is recognized to be "the more important aspect of the vagueness

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[23]As explained in part II, *supra*, punitive damages in purpose and effect are a criminal penalty. "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 359 n.8 (1983). Even if punitive damages properly could be considered a remedial civil sanction (they cannot), the present reality of enormous awards— far in excess of any fine which can be levied under existing criminal laws—means there is no room to tolerate vagueness. The consequences of imprecision frequently are draconian.

doctrine." *Kolender,* 461 U.S. at 358. A statement of this aspect of the doctrine is in *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1979):

> "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to . . . judges . . . and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." (Footnotes omitted.)

This Court already has recognized that punitive damages are susceptible to arbitrary and discriminatory application. "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *Electrical Workers,* 442 U.S. at 50 n.14. The "unpopular defendants" in this context are usually those with wealth, primarily corporations, frequently insurance companies. The need for specific standards to guide jury discretion in order to prevent punitive awards which are arbitrary and discriminatory in amount is apparent.

Yet Mississippi allows jurors essentially unbridled discretion in fixing the amount of a punitive award. The defendant's financial worth is the only objective consideration. But, while evidence of wealth may provide some guidance in setting an amount sufficient to deter when the defendant is an individual of normal means or a small business, it is less and less meaningful as wealth increases, to the point of providing no guidance whatsoever when a multi-million or multi-billion dollar corporation is involved. Consider the following hypothetical: Suppose an individual with net worth of $10,000, a company with net worth of $100 million, and a company with net worth of $1 billion engage in identical tortious conduct causing identical injuries to plaintiff. The jury determines that the imposition of $1,000 in punitive damages against the individual defendant (ten percent of net worth) is sufficient punishment to have the prescribed deterrent effect. On its face, this appears to be reasonable. But does this mean the jury should impose punitive damages of $10 million against the

first company (ten percent of its net worth, but 10,000 times more than the fine imposed on the individual), and $100 million against the second company (ten percent of its net worth, but 100,000 times more than the fine imposed on the individual) in order to achieve the same deterrent effect? Certainly not.[24] But the jury is not told how the corporate defendants should be treated differently from the individual defendant. The same, imprecise "financial worth of the defendant" factor is used in every case. The particular vagueness of this factor where corporations are concerned means it is of little or no use where it is needed the most.

The availability of review of a jury's punitive damage verdict for excessiveness does not remedy the unconstitutional vagueness of the "standard" the jury uses. Case-by-case judicial review for excessiveness is no substitute for a precise standard in the first instance. *See Santosky*, 455 U.S. at 757; Wheeler, *supra*, at 288. This is particularly true in Mississippi, where the Supreme Court is extremely deferential to a jury's determination of the amount of a punitive award, *e.g., Gardner v. Jones*, 464 So.2d 1144, 1150 n.5 (Miss. 1985) ("we have expressed a great reluctance to interfere with the amount of a punitive damages assessment made by a jury"), and it reviews awards to see if they are excessive under the same, vague "financial worth of the defendant" standard given to the jury, *e.g., Bankers Life & Cas. Co.*, 483 So.2d at 279 ("However high that amount [$1.6 million] may 'seem,' it may not . . . be said to shock the judicial conscience" because it is less than one percent of the defendant's net worth). In any event, reliance on case-by-case review by an appellate court is simply unfair. It means the defendant necessarily must incur the expense of prosecuting an appeal.[25]

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[24]Yet this is exactly how plaintiffs' counsel usually argue the case to the jury.

[25]In Mississippi, the 15 percent penalty imposed by law on a losing appellant discourages even seeking appellate review. Miss. Code Ann. § 11-3-23 (Supp. 1986).

At bottom, one is hard pressed to devise a penalty more vague and destructive than is permitted by most states' punitive damage laws. There is no essential difference between these laws and a criminal fine without an upper limit. We are confident this Court would not countenance a law imposing a limitless fine. Neither should it countenance these limitless punitive damage laws under which juries have rendered such incredible verdicts.

CONCLUSION

Amici respectfully request that this Court examine and reassess punitive damages in light of the constitutional principles we have discussed. Based on these principles, we submit the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,
HORVITZ, LEVY & AMERIAN
ELLIS J. HORVITZ
MICHAEL R. TYLER
S. THOMAS TODD
Attorneys for
THE ALLIANCE OF AMERICAN INSURERS,
THE AMERICAN INSURANCE ASSOCIATION, and
THE NATIONAL ASSOCIATION
OF INDEPENDENT INSURERS

APPENDIX

1976

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 5,300,000	Austero v. Washington National Insurance Co.	20/30/38
935,000	Eichar v. Surety Life Insurance Co.	20/15/35
511,138	Runnels v. Astra Pharmaceut	20/32/12
379,000	Fleckner-Palmtag Realty v. Kaufman	21/3/9
175,000	Townhouse Gardens v. Reliance Capital Corp.	20/19/32
125,000	U.S. Cablevision v. Microwave Engineering, Inc.	20/14/21
100,000	Richardson v. Handy Pantry Food Stores	20/47/18

1977

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 10,000,000	Rosener v. Sears, Roebuck & Co.	21/5/2
2,000,000	Von Brimer v. Whirlpool Corp.	22/4/11
336,000	Austero v. National Casualty of Detroit	21/10/38
275,000	Sinclair v. Flo-Kem Products	21/31/19
250,000	Anderson v. Weisman	21/15/15
250,000	Lemer v. Boise Cascade	21/19/1
220,000	Ginsburg v. Ginsburg	21/39/6
175,000	Parks v. Marine Office of America	21/21/37
150,000	Miller v. Elite Insurance Co.	21/16/6

1978

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000,000	Grimshaw v. Ford Motor Co.	22/14/26
4,000,000	Hasson v. Ford Motor Co.	22/45/23
1,750,000	Pawlaczyk v. American Hospital Supply Co.	22/36/18
1,500,000	Mardor v. Richards Manufacturing Co.	22/29/19
1,075,000	Jones v. Bank of America	22/52/4
1,000,000	Bialak v. Montgomery Ward Co.	22/51/14
663,000	Veterinary Pathology v. Revlon, Inc.	22/43/24
500,000	Davis v. Environmental Power Ltd.	22/31/22
500,000	Dickinson v. Vorelco of Cal., Inc.	22/24/4
500,000	J. Blazona Constr., Inc. v. Evert	22/48/6
250,000	Stranlund v. Safeco Title Insurance Co.	22/46/21
165,000	Davis v. Blue Cross of Northern California, Inc.	22/42/3
150,000	Chevalier v. Dubin	22/26/20
140,000	Aikey v. Vletas	22/16/20

1979

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 17,750,003	Harmsen v. Smith	24/5/23
11,058,810	Seaman's Direct Buying Service v. Standard Oil Co. of Cal.	23/51/1
1,500,001	Kanins v. American Hawaiian Steamship Co.	24/2/29
1,310,000	Helderman v. Int'l Brotherh'd of Elec. Wrkrs.	23/17/3
1,000,000	MPB Associates v. United California Bank	23/46/6
900,000	Parnell v. Continental Casualty Co.	23/40/7
872,001	Ingram v. Commercial Bankers	23/32/22
350,000	Smith v. La Vista Cemetery Assn.	24/5/22
315,000	Gilmore v. International Finance and Trade Development Corp.	23/36/27
150,000	Alhino v. Western Title Guaranty Co.	23/8/1
110,000	Fitzgerald v. Advanced Health Systems, Inc.	23/38/28
100,000	Laurens v. Republic Nat'l Life Insurance Co.	23/39/17

1980

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 9,900,000	Union Bank v. Fireman's Fund Ins. Co.	24/25/27
6,510,000	Golf West of Kentucky, Inc. v. Life Investors, Inc.	24/33/22
4,500,000	Norman v. Colonial Penn Franklin Life Ins. Co.	24/52/19
3,000,000	Sanders Farms, Inc. v. Griffin	24/43/18
2,200,000	C.C. Davis & Co. v. Alioto	24/28/2
1,500,000	Wayte v. Rollins International, Inc.	25/8/12
1,350,000	Uhlmann Offices, Inc. v. City National Bank	24/51/13
1,000,000	Glover v. Allstate Insurance Co.	25/2/19
1,000,000	Pistorius v. Prudential Insurance Co.	24/17/3
750,000	Noronha v. Blue Cross of No. California	24/20/6
560,000	Rosen v. Sneed	24/48/16
525,000	Diaz v. Tribune Publishing Co.	24/8/3
400,000	Cohen v. Fitzsimmons	24/17/4
350,500	Jones v. Allstate Insurance Co.	24/26/40
346,000	Ambrose v. Scott	24/48/3
300,000	Oberg v. A-S Development, Inc.	24/30/12
275,000	Price v. Cavanaugh	25/3/17

1980 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 250,000	M.V. Golden Pacific v. San Diego Marine Constr.	24/12/25
200,000	Austero v. Washington National Insurance Co.	24/21/24
200,000	Chodos v. Insurance Co. of North America	24/26/30

1981

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 3,117,946	Spieker v. Senator Hotel Associates	26/5/8
3,000,000	Betts v. Allstate Insurance Co.	25/48/17
2,500,000	Moore v. American United Life Insurance Co.	26/15/13
2,073,559	The Glovatorium, Inc. v. Nat'l Cash Register	25/25/4
2,000,000	Aceto v. Certified Life Insurance Co. of Cal.	25/27/10
2,000,000	California Shoppers, Inc. v. Royal Globe Insurance	
2,000,000	Smithers v. Metro-Goldwyn-Mayer, Inc.	25/46/24
1,500,000	Hinton v. Venture Out in America, Inc.	25/13/8
1,500,000	Marino v. Synanon Church	25/43/7
1,300,000	Burnett v. National Enquirer, Inc.	25/25/23
750,000	McKibben v. Connecticut Indemnity Co.	26/9/9
750,000	Ziglar v. Noble	25/52/19
700,000	Roland v. Al Sabah	25/48/2
584,045	Baker v. Kemper Insurance Co.	25/10/34
558,160	Paulfrey v. Blue Chip Stamps Co.	25/46/31
500,000	Bananejad v. Habish Int'l, Inc.	25/48/5

1981 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg
$500,000	Mosby v. Duffin	25/28/6
260,000	Palmer v. Smith's Food King Market	26/5/16
250,000	Hapip v. Texas Renaissance Festival, Inc.	25/26/5
200,000	Ray v. Bank of America	26/5/4
200,000	Rulon-Miller v. IBM Corp.	26/11/1
200,000	Schlager v. Homel	25/29/19
200,000	Songer v. Bordan	25/39/3
166,000	Kennedy v. Pier 1 Imports	26/2/6
150,000	Insurors of California v. DeMarco, Barger, Beral & Pierno	25/21/17
116,000	Fleming v. Safeco Insurance Co. of America	26/5/19
100,000	Badagliacia v. Millennium	25/24/12
100,000	Waite v. Wasserman	25/38/7
100,000	Young v. Personal Service Insurance Co.	25/30/16

1982

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 17,500,000	The P.K.L. Companies v. The Eaton Corp.	26/28/23
10,000,000	West v. Johnson & Johnson Products, Inc.	27/13/8
4,500,000	Norton v. Kaiser Steel Corp.	26/51/30
3,000,000	Pitzer v. Security Pacific National Bank	26/18/27
2,500,000	Pollard v. National Life & Accident Co.	26/50/26
2,250,000	Beltz Travel Service, Inc. v. Trans World Airlines	26/15/4
2,000,000	Boles v. Travelers Indemnity Co.	27/17/5
1,500,000	Travelers Insurance Co. v. Lesher	26/36/2
1,125,000	Toshiba Semi Conductor USA v. Consortium	26/24/12
1,100,000	Garvey v. State Farm Fire and Casualty Co.	26/17/8
1,000,000	Bailey v. U-Haul International, Inc.	26/47/3
1,000,000	Klinger v. Plastic & Rubber Products	26/49/21
1,000,000	Thomsen v. Volkswagen of America	26/50/1
750,000	Gonzales v. Underwriters at Lloyds, London	26/37/12

1982 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 606,096	Supreme Industries, Inc. v. Centurion Boats, Inc.	26/33/18
600,000	Lloyd v. Fila Sports, Inc.	26/51/4
600,000	Moss v. Equitable Life Assurance Society	26/43/11
600,000	Shannon v. Jackes-Evans Manufacturing Co.	27/9/10
500,000	Scholtz v. Shearson, Hayden, Stone, Inc.	27/1/3
500,000	Woodland Production Credit Assn. v. Nicholas	26/49/15
445,000	Geller v. 227 East Anapamu St., Ltd.	27/8/37
350,000	Pellegrini v. Aycock	26/39/5
350,000	Stepp v. Great Western Savings & Loan Assn.	26/48/6
250,000	Smith v. Hollywood Collateral Loan Assn.	26/53/4
125,000	Cook v. Sears, Roebuck and Co.	27/14/37
100,000	Granich v. Shapray	27/7/20
100,000	Hill v. National Auto & Casualty Insurance Co.	27/2/22
100,000	Kennedy v. Building Services Local 87	26/20/1
100,000	Lederman v. Pacific Mutual	27/2/28
100,000	Meyer v. Byron Jackson, Inc.	26/39/29
100,000	Newman v. Roston	26/50/39
100,000	Rhea v. RCA Corp.	26/28/18

1983

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 40,025,000	Fellows v. Allstate Insurance Co.	28/23/19
15,000,000	The P.K.L. Companies v. The Eaton Corp.	27/52/21
13,054,479	Berk v. National Union Fire Insurance Co.	27/44/16
8,456,250	Greenberg v. Coldwell Banker Co.	28/20/25
8,000,000	Frazier v. Metropolitan Life Insurance Co.	27/24/21
5,000,000	Sprague v. Equifax, Inc.	27/17/31
2,681,000	Clark v. Wits, Inc.	27/48/16
2,035,000	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp.	27/36/3
2,000,000	Shepler v. Anami Ashram, Inc.	27/18/9
1,800,000	Pitts v. Fibreboard Corp.	28/8/1
1,500,000	Young v. Great Western United, Inc.	27/42/26
1,000,000	Creative Wood Design v. Aetna Casualty and Surety Insurance Co.	28/4/8
1,000,000	Lembo v. Nardoni	28/26/20
900,000	Mancini v. Royal Indemnity Co.	27/21/1
750,000	Glass v. Philip Roxanne, Inc.	28/26/12
750,000	Ladd v. Superfilm, Ltd.	28/26/24

1983 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 500,000	Four 425 Shatto Bldg. Co. v. Air Conditioning Co., Inc.	27/35/20
500,000	Nakahara v. Ace American, Inc.	27/30/7
480,000	Baysinger v. Pacific Mutual Life Insurance Co.	28/19/17
400,000	Sullivan v. Kaiser Foundation Health Plan, Inc.	28/17/25
360,000	Wilson v. Meyer	28/19/34
339,525	Kan v. American District Telegraph Co.	27/42/2
300,000	Adams v. Esparza	27/49/5
250,000	Collins v. Berner	28/15/7
240,000	Robinson v. Firestone Tire & Rubber Co.	27/33/21
225,000	Dime's Group v. Travenol Laboratories, Inc.	28/12/10
220,000	Hobbs v. Bateman, Eichler, Hill Richards	27/24/24
200,000	Bravo v. The Clubhouse	27/44/25
200,000	Shirkhani v. Starcrest Products of California	27/40/14
200,000	Wright v. Randles	27/32/6
150,000	Frankenberger v. Int'l Real Estate Network	28/26/22
150,000	Mammoth Vista Owners Assn. v. General Ins. Co.	27/51/15
150,000	Silverado Title Co. v. Sorensen	28/13/15
139,000	Kelly v. General Telephone Co.	28/25/20

1983 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000	Northrup v. Fink	28/14/7
125,000	Schroeder v. Safeco Insurance Co.	28/7/12
100,000	Americana Air Cargo v. Sendrex Cargo	28/6/23
100,000	Calloway v. Travelers Insurance Co.	27/29/13
100,000	Schwab v. Smith	28/6/14

1984

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 5,000,000	Bertolani v. Equitable Life Assurance Society	28/29/18
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.	28/28/16
4,300,000	Dustman v. AMC Jeep Corp.	28/41/13
4,000,000	Haughton v. Unigard Mutual Insurance Co.	28/39/24
4,000,000	Royster v. Mission Insurance Co.	28/35/11
3,500,000	Mattie v. Picker Corp.	28/37/9
3,000,000	Litwak v. Fed Mart Corp.	28/44/71
2,660,000	Seeley v. Seymour	28/20/7
2,000,000	Ballou v. Traweek Investment Co., Inc.	28/52/25
2,000,000	Taylor v. State Farm Fire & Casualty Ins. Co.	28/39/22
2,000,000	Tushinsky v. Tushinsky	28/51/21
1,584,000	Phillips v. Travelers Financial Services, Inc.	29/18/16
1,500,000	Davis v. Continental Insurance Co.	28/39/13
1,500,000	Stern v. Dow Corning Corp.	29/17/18
1,500,000	Umann v. Mor-Ben Insurance Markets Corp.	29/16/3
1,150,000	Farrell v. Police & Fireman Insurance Assn.	28/47/12

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 1,007,000	Satalich v. State Farm Mutual Auto Insurance Co.	28/37/29
1,000,000	McNair v. Worldwide Church of God	29/8/22
750,000	Darblay v. Western Medical Enterprises, Inc.	29/3/10
732,083	Spangler v. Great Southwest Fire Insurance Co.	29/20/31
680,000	Dunkley v. Vermeer Mfg. Co.	28/38/1
650,000	Doe v. Elashi	29/18/37
525,000	Fisher v. 20th Century Insurance Co.	28/49/51
500,000	Ackerman v. K-Mart Discount Stores, Inc.	29/4/24
500,000	Foreman v. United Insurance Co. of America	29/9/11
500,000	Total Experience Records, Inc. v. Lang	29/5/18
442,500	Greenfield v. Spectrum Investment Corp.	28/30/25
400,000	Coastside Publishers and Printers v. Half Moon Bay Review, Inc.	28/16/2
400,000	Jones v. Montgomery Ward	28/34/20
370,000	Weaver v. Grodins of California, Inc.	28/45/5
300,000	Shook v. International Dairy Queen, Inc.	29/16/21
294,000	Comfort v. Farasat	29/14/11

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 292,210	Barbara Colton Interiors v. Joesoef	28/50/11
288,750	Waite v. Smith, Klieman & St. Francis Hosp.	29/16/31
276,000	Smith v. J.C. Penney, Inc.	29/18/21
250,000	Hanes v. Davis	28/21/13
244,000	San Jose Cash Register v. Tokyo Electronics Corp.	29/15/8
200,000	Kauric v. Hodgson	28/49/67
200,000	Velzy Engineering & Machine, Inc. v. Western Industrial Corp.	28/51/21
200,000	Vitali v. Bartell	28/34/22
200,000	Wells v. Raymark Industries, Inc.	29/9/6
189,272	United Western Insurance Marketing v. Olken	28/33/16
175,000	Boozer v. All-West Design, Inc.	28/15/12
175,000	Gigliotti v. Collins	28/41/11
175,000	Knott v. Boutin	28/47/11
175,000	Putz v. Industrial Indemnity Co.	29/11/15
160,000	Pusateri v. E.F. Hutton & Co., Inc.	28/48/11
150,000	Agarwal v. Bechtel Corp.	28/19/10
150,000	Smyth v. Herschensohn	29/7/25
140,000	Adams v. California Land Title Co.	28/31/18
134,000	Godfrey v. West Coast Folk Clubs, Inc.	29/20/32

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000	Greenup v. Bankers United Life Assurance Co.	28/44/29
125,000	Sanders v. Airport Park Hotel	28/38/32
125,000	Stewart v. Cal-Farm Insurance Co.	29/7/19
120,000	Allan v. Cal-Farm Insurance Co.	28/33/13
114,000	Nelson v. Arcuri	28/40/9
112,500	Welch v. Marx	28/49/61
102,000	Friedman v. Spataro	29/8/5
100,002	Tassey v. Madera Warehouse Co., Inc.	28/33/11
100,000	Abel v. Abel	28/23/29
100,000	Basque French Bakery v. Toscana Baking Co.	28/39/14
100,000	Coleman & Christianson, Inc. v. Gold Depository and Loan Co.	28/23/2
100,000	Davies v. Parker	28/36/2
100,000	Frazier v. City of Alameda	28/30/1
100,000	Multiplex Insurance Agency, Inc. v. California Life Insurance Co.	29/7/1
100,000	Oranje v. Bank of America	28/22/14
100,000	Wilson v. Midland National Life Insurance Co.	28/29/22
100,000	Wright v. Echandi	28/17/18

1985

Punitive Damage Jury Verdicts
$100,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 125,000,000	Micro/Vest v. Computerland	29/40/1
46,500,000	Haun v. NEC Electronics	29/28/12
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.	29/36/23
26,675,000	Kruse v. Bank of America	29/48/11
20,000,000	Rice Growers Assn v. Trans-america Delaval, Inc.	29/25/7
10,000,000	McCullough v. S & H Insurance Co.	29/20/21
10,000,000	Stanton v. Continental Casualty Co.	30/8/18
8,500,000	Sykes v. Allstate Insurance Co.	30/7/21
7,163,340	Tidwell v. Republic Insurance Co.	30/5/13
7,000,000	Hronis v. Liberty Mutual Insurance Co.	29/32/25
6,243,750	Bryn Mar v. Browne	30/16/32
5,002,500	Eastridge v. Shell Oil Co.	29/19/38
3,500,000	Nielsen v. Atlantic Richfield Co.	30/5/28
3,115,000	Wright v. General Accident Fire & Life Assurance Corp.	30/12/21
3,000,000	Sharma v. Safeco Insurance Co.	29/37/20

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 2,585,000	E & H Wholesale, Inc. v. Glaser Bros.	29/45/18
2,500,000	Fitzsimmons v. American Mutual Insurance Co.	29/37/5
2,500,000	Gagnon v. Continental Casualty Co.	29/41/10
2,453,294	TRW, Inc. v. GTE Products Corp.	29/35/9
2,350,000	Rookhuizen v. Aames Home Loan, Inc.	29/29/27
2,127,500	Crake v. Martin	30/14/36
2,120,000	Young v. Knudsen Corp.	29/18/32
2,002,500	Kreisher v. Mobil Oil	30/29/3
2,000,000	Garrett v. Montgomery Ward Co.	30/2/8
2,000,000	Lisec v. United Airlines	30/26/15
1,500,000	Emerson v. Hitachi Sales Corp.	30/39/32
1,500,000	Thomsen v. Pacific Telephone & Telegraph Co.	29/37/7
1,400,000	Fox v. Hobie Coast Catamaran	29/28/29
1,360,000	Bettencourt v. Fireman's Fund Insurance Co.	29/47/13
1,085,000	Orsatti v. Farmer	29/46/20
1,060,000	Feldman v. Fox and Carskadon	29/38/9
1,007,500	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.	29/21/71
921,000	Cohen v. ViaCom Enterprises, Inc.	30/11/20

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 800,000	Backus v. Foremost Insurance Co.	30/7/25
800,000	Stegeman v. Sears, Roebuck and Co.	29/50/1
750,000	Carpet Svc. Systems v. Canadian Indemnity Co.	29/35/23
750,000	Sarno v. Sentry Insurance Co.	29/40/15
700,000	Hughes v. Blue Cross of California	29/27/6
662,500	Cistaro v. GC Services Corp.	29/29/19
500,000	Chapman v. Tera Pharmaceuticals, Inc.	30/3/23
500,000	Pierovich v. Equitable Life Assurance Society	29/47/24
500,000	Russell v. Sentry Indemnity Co.	30/4/20
500,000	Simon v. Eureka Financial Corp.	30/5/6
500,000	Watkins v. Arklin	30/39/27
500,000	Thompson v. Boys Market	30/39/27
400,000	Hess v. Air France	29/23/30
400,000	Kramer, Wilson, Sauvegeau, Inv. v. Sauvegeau	29/38/26
400,000	Morales v. Insurance Co. of No. America	30/8/11
400,000	Thomas v. Aubrey	29/48/23
300,000	Foor v. Reliance Insurance Co.	29/35/20
300,000	Ross-Leming v. Continental Insurance Co.	29/33/20

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 250,000	Ruby v. Industrial Indemnity Co.	29/21/29
241,058	Manhattan Life Insurance Co. v. Eldridge	29/24/22
200,297	Ringham v. A.T. Kearney, Inc.	29/48/15
200,000	Green v. Standard Brands Paint Co.	30/5/24
200,000	Nethery v. Unterthiner	29/42/29
200,000	Stephens v. Coldwell Banker	30/1/6
180,000	Kee v. Farmers Insurance Exchange	29/30/3
176,000	Hooper v. Fort Howard Paper Co.	29/34/19
175,000	Ambrose v. U.S. Steel Corp.	29/46/13
160,000	Moore v. Peterson	29/51/15
150,000	B & H Manu. Co. v. Williamson	30/35/13
150,000	Palmer v. Ted Stevens Honda, Inc.	29/51/7
135,000	Avila v. Commercial Union Insurance Co.	30/9/25
125,000	Wallis v. Beverly Fabrics	30/22/3
118,500	Winograd v. Mangel	29/22/28
100,000	Aston v. Yamaha Motor Corp.	29/41/16
100,000	Brown v. Sierra Pacific Power Co.	29/36/31
100,000	Gorospe v. Rosselli	29/21/6
100,000	Jacques Interiors v. Petrak	29/27/24

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.
$ 100,000	Martin v. Farmers Insurance Group	29/34/2
100,000	Martin v. Sunrise Memorial Cemetary	29/26/1
100,000	Ochoa v. Financial Indemnity Co.	29/31/23
100,000	Schletewitz v. Industrial Indemnity Co.	29/36/15
100,000	Ganci v. Air Cal	30/17/31
100,000	Para v. Watsonville Canning Co.	30/17/7

1976

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$5,300,000	Austero v. Washington National Insurance Co.	20/30/38	Remitted to $250,000	Ira Rivin Attorney for Defendant

1977

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$10,000,000	Rosener v. Sears, Roebuck & Co.	21/5/2	Denied[1]	110 Cal.App.3d 740, 752
2,000,000	Von Brimer v. Whirlpool Corp.	22/4/11	Granted	Christina Snyder Attorney for Plaintiff

[1]Court of Appeal remitted to $2.5 million. 110 Cal.App.3d 740, 757.

B2

1978

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$125,000,000	Grimshaw v. Ford Motor Co.	22/14/26	Remitted to $3.5 million	119 Cal.App.3d 757, 772
4,000,000	Hasson v. Ford Motor Co.	22/45/23	Denied	32 Cal.3d 388, 398
1,750,000	Pawlaczyk v. American Hospital Supply Co.	22/36/18	Denied	John Gilmore Attorney for Defendant
1,500,000	Marmer v. Richards Manufacturing Co.	22/29/19	Denied	Arthur Schwimmer Attorney for Plaintiff
1,075,000	Jones v. Bank of America	22/52/4	Granted	George Duff Attorney for Defendant

1978 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
1,000,000	Bialak v. Montgomery Ward Co.	22/51/14	Remitted to $500,000	James Waldorf Attorney for Defendant

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$17,750,003	Harmsen v. Smith	24/5/23	Denied	Jury Verdicts Weekly
11,058,810	Seaman's Direct Buying Service v. Standard Oil Co. of Cal.	23/51/1	Remitted to $7 million	36 Cal.3d 752, 762
1,500,001	Kanins v. American Hawaiian Steamship Co.	24/2/29	Denied	Ellis J. Horvitz Attorney for Defendant
1,310,000	Helderman v. Int'l Brotherh'd of Elec. Wrkrs.	23/17/3	Denied	Alan C. Davis Attorney for Defendant
1,000,000	MPB Associates v. United California Bank	23/46/6	Remitted to $0	Robert Lofts Attorney for Defendant

1980

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$9,900,000	Union Bank v. Fireman's Fund Ins. Co.	24/25/27	Remitted to $1 million	Maynard Brown Attorney for Defendant
6,510,000	Golf West of Kentucky, Inc. v. Life Investors, Inc.	24/33/22	Denied	Jerold V. Goldstein Attorney for Defendant
4,500,000	Norman v. Colonial Penn Franklin Life Insurance Co.	24/52/19	Denied	John Hager Attorney for Defendant
3,000,000	Sanders Farms, Inc. v. Griffin	24/43/18	Remitted to $200,000	Jury Verdicts Weekly

2,200,000	C.C. Davis & Co. v. Alioto	24/28/2	Remitted to $264,000	James Penrod Attorney for Plaintiff
1,500,000	Wayte v. Rollins International, Inc.	25/8/12	Remitted to $408,000[2]	169 Cal.App.3d 1, 9
1,350,000	Uhlmann Offices, Inc. v. City National Bank	24/51/13	Remitted to $350,000	Ellis J. Horvitz Attorney for Plaintiff
1,000,000	Glover v. Allstate Insurance Co.	25/2/19	Denied	Donald Ruston Attorney for Defendant
1,000,000	Pistorius v. Prudential Insurance Co.	24/17/3	Denied	123 Cal.App.3d 541, 544 n.2

[2]Court of Appeal reinstated $50,000. 169 Cal.App.3d 1, 16.

1981

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$3,117,946	Spieker v. Senator Hotel Associates	26/5/8	Denied	Theodore Marois Attorney for Defendant
3,000,000	Betts v. Allstate Insurance Co.	25/48/17	Denied	154 Cal.App.3d 688, 697
2,500,000	Moore v. American United Life Insurance Co.	26/15/13	Denied	150 Cal.App.3d 610, 642
2,073,559	The Glovatorium, Inc. v. Nat'l Cash Register	25/25/4	Denied	William Irvin Attorney for Defendant
2,000,000	Aceto v. Certified Life Insurance Co. of Cal.	25/27/10	Remitted to $1 million	Jury Verdicts Weekly

2,000,000	California Shoppers, Inc. v. Royal Globe Insurance Co.	25/38/15	Denied; JNOV granted	175 Cal.App.3d 1, 13
2,000,000	Smithers v. Metro-Goldwyn-Mayer, Inc.	25/46/24	Remitted to $1 million	Jury Verdicts Weekly
1,500,000	Hinton v. Venture Out in America, Inc.	25/13/8	Denied	Jury Verdicts Weekly
1,500,000	Marino v. Synanon Church	25/43/7	Remitted to $1 million	Daniel Crawford Attorney for Defendant
1,300,000	Burnett v. National Enquirer, Inc.	25/25/23	Remitted to $750,000	144 Cal.App.3d 991, 997

1982

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$17,500,000	The P.K.L. Companies v. The Eaton Corp.	26/28/23	Granted	Jury Verdicts Weekly (27/52/21)
10,000,000	West v. Johnson & Johnson Products, Inc.	27/13/8	Remitted to $1 million	174 Cal.App.3d 831, 840
4,500,000	Norton v. Kaiser Steel Corp.	26/51/30	Granted	Jury Verdicts Weekly
3,000,000	Pitzer v. Security Pacific National Bank	26/18/27	Denied	J. Randall Faith Attorney for Defendant
2,500,000	Pollard v. National Life & Accident Co.	26/50/26	Denied	Jury Verdicts Weekly

2,250,000	Beltz Travel Service, Inc. v. Trans World Airlines	26/15/4	Denied	Steve Tausz Attorney for Defendant
2,000,000	Boles v. Travelers Indemnity Co.	27/17/5	Remitted to $1.2 million	Jury Verdicts Weekly
1,500,000	Travelers Insurance Co. v. Lesher	26/36/2	No motion filed	Jury Verdicts Weekly
1,125,000	Toshiba Semi Conductor USA v. Consortium	26/24/12	Denied	Thomas Hartwell Attorney for Defendant
1,100,000	Garvey v. State Farm Fire and Casualty Co.	26/17/8	Denied	Jury Verdicts Weekly
1,000,000	Bailey v. U-Haul International, Inc.	26/47/3	Denied	Jury Verdicts Weekly
1,000,000	Klinger v. Plastic & Rubber Products	26/49/21	Denied	Hillel Chodos Attorney for Plaintiff
1,000,000	Thomsen v. Volkswagen of America	26/50/1	Denied	James Crawford Attorney for Plaintiff

1983

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$40,025,000	Fellows v. Allstate Insurance Co.	28/23/19	Granted	Judith Gold Attorney for Defendant
15,000,000	The P.K.L. Companies v. The Eaton Corp.	27/52/21	Denied	Jury Verdicts Weekly
13,054,479	Berk v. National Union Fire Insurance Co.	27/44/16	Denied	Jury Verdicts Weekly
8,456,250	Greenberg v. Coldwell Banker Co.	28/20/25	Remitted to $2 million	Ellis J. Horvitz Attorney for Plaintiff

8,000,000	Frazier v. Metropolitan Life Insurance C[illegible].	27/24/21	Remitted to $2 million	169 Cal.App.3d 90, 94
5,000,000	Sprague v. Equifax, Inc.	27/17/31	Remitted to $1 million	166 Cal.App.3d 1012
2,681,000	Clark v. Wits, Inc.	27/48/16	Denied	Scott Spolin Attorney for Defendant
2,035,000	S.R.H. Fabrics, Inc. v. Formoco Int'l Corp.	27/36/3	Denied	Peter Bersin Attorney for Defendant
2,000,000	Shepler v. Anami Ashram, Inc.	27/18/9	Denied	Burton McGovern Attorney for Defendant
1,800,000	Pitts v. Fibreboard Corp.	28/8/1	Denied	Jury Verdicts Weekly
1,500,000	Young v. Great Western United, Inc.	27/42/26	Denied	Jury Verdicts Weekly
1,000,000	Creative Wood Design v. Aetna Casualty and Surety Insurance Co.	28/4/8	Denied	Jonathan Erb Attorney for Defendant
1,000,000	Lembo v. Nardoni	28/26/20	Denied	Tony Hemming Attorney for Defendant

1984

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$5,000,000	Bertolani v. Equitable Life Assurance Society	28/29/18	Denied	Jury Verdicts Weekly
5,000,000	Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.	28/28/16	Denied	189 Cal.App.3d 1072, 1099
4,300,000	Dustman v. AMC Jeep Corp.	28/41/13	Remitted to $1 million	Russell Reiner Attorney for Plaintiff
4,000,000	Haughton v. Unigard Mutual Insurance Co.	28/39/24	Denied	Jury Verdicts Weekly
4,000,000	Royster v. Mission Insurance Co.	28/35/11	Denied	David Simon Attorney for Defendant

3,500,000	Mattie v. Picker Corp.	28/37/9	Denied	Jury Verdicts Weekly
3,000,000	Litwak v. Fed Mart Corp.	28/44/71	Denied	Jury Verdicts Weekly
2,660,000	Seeley v. Seymour	28/20/7	Denied	John Dickson Attorney for Defendant
2,000,000	Ballou v. Traweek Investment Co., Inc.	28/52/25	Remitted to $250,000	Jury Verdicts Weekly
2,000,000	Taylor v. State Farm Fire & Casualty Insurance Co.	28/39/22	Denied	Jury Verdicts Weekly
2,000,000	Tushinsky v. Tushinsky	28/51/21	Denied	Jury Verdicts Weekly
1,584,000	Phillips v. Travelers Financial Services, Inc.	29/18/16	Denied	Geoffrey Bourroughs Attorney for Defendant
1,500,000	Davis v. Continental Insurance Co.	28/39/13	Denied	Jury Verdicts Weekly
1,500,000	Stern v. Dow Corning Corp.	29/17/18	Denied	Sonja Blomquist Attorney for Defendant
1,500,000	Umann v. Mor-Ben Insurance Markets Corp.	29/16/3	Remitted to $750,000	Jury Verdicts Weekly

1984 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
1,150,000	Farrell v. Police & Fireman Insurance Assn.	28/47/12	Remitted to $161,000	Jury Verdicts Weekly
1,007,000	Satalich v. State Farm Mutual Auto Insurance Co.	28/37/29	Settled prior to new trial hearing	Ryan Knapp Attorney for Defendant
1,000,000	McNair v. Worldwide Church of God	29/8/22	Denied	Jury Verdicts Weekly

1985

Punitive Damage Jury Verdicts
$1,000,000 And Over

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
$125,000,000	Micro/Vest v. Computerland	29/40/1	Denied	Jury Verdicts Weekly
46,500,000	Haun v. NEC Electronics	29/28/12	Granted	Jury Verdicts Weekly
35,000,000	Tan Jay International, Ltd. v. Canadian Indemnity Co.	29/36/23	Remitted to $500,000	Joseph Ryan Attorney for Defendant
26,675,000	Kruse v. Bank of America	29/48/11	Remitted to $6 million	Jury Verdicts Weekly
20,000,000	Rice Growers Assn. v. Transamerica Delaval, Inc.	29/25/7	Remitted to $1 million	Ellis J. Horvitz Attorney for Defendant

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
10,000,000	McCullough v. S & H Insurance Co.	29/20/21	Remitted to $6 million	Claire Johnson Attorney for Defendant
10,000,000	Stanton v. Continental Casualty Co.	30/17/19	Remitted to $5 million	Jury Verdicts Weekly
8,500,000	Sykes v. Allstate Insurance Co.	30/7/21	Denied	David Zwieg Attorney for Defendant
7,163,340	Tidwell v. Republic Insurance Co.	30/5/13	Remitted to $932,550	Jury Verdicts Weekly

7,000,000	Hronis v. Liberty Mutual Insurance Co.	29/32/25	Remitted to $2 million	Ellis J. Horvitz Attorney for Defendant
6,243,750	Bryn Mar v. Browne	30/16/32	Remitted to $4,242,995	Ellis J. Horvitz Attorney for Defendant
5,002,500	Eastridge v. Shell Oil Co.	29/19/38	Denied	Harris Steinberg Attorney for Plaintiff
$3,500,000	Nielsen v. Atlantic Richfield Co.	30/5/28	Denied	Jury Verdicts Weekly
3,115,000	Wright v. General Accident Fire & Life Assurance Corp.	30/12/21	Remitted to $2.26 million	Ellis J. Horvitz Attorney for Defendant
3,000,000	Sharma v. Safeco Insurance Co.	29/37/20	Remitted to $1 million	Jury Verdicts Weekly
2,585,000	E & H Wholesale, Inc. v. Glaser Bros.	29/37/20	Settled prior to new trial hearing	Peter Gelblum Attorney for Defendant
2,500,000	Fitzsimmons v. American Mutual Insurance Co.	29/37/5	Remitted to $350,000	Jury Verdicts Weekly

1985 Continued

Amount	Case Name	Jury Verdicts Weekly Vol./No./Pg.	Result of New Trial Motion Re: Punitive Damages	Source for Result
2,500,000	Gagnon v. Continental Casualty Co.	29/41/10	Denied	Jury Verdicts Weekly
2,453,294	TRW, Inc. v. GTE Products Corp.	29/35/9	Denied	Ardell Johnson Attorney for Defendant
2,350,000	Rookhuizen v. Aames Home Loan, Inc.	29/29/27	Denied	Gordon Opel Attorney for Defendant
2,127,500	Crake v. Martin	30/14/36	Settled prior to new trial hearing	Michael Portigal Attorney for Defendant
2,120,000	Young v. Knudsen Corp.	29/18/32	Settled prior to new trial hearing	Benjamin Williams Attorney for Defendant
2,002,500	Kreisher v. Mobil Oil	30/29/3	Denied	William O'Brien Attorney for Defendant

2,000,000	Garrett v. Montgomery Ward Co.	30/2/8	Denied	Zachary Smith Attorney for Defendant
2,000,000	Lisec v. United Airlines	30/26/15	Denied	Jury Verdicts Weekly
1,500,000	Emerson v. Hitachi Sales Corp.	30/39/32	Remitted to $200,000	Craig Jorgenson Attorney for Defendant
1,500,000	Thomsen v. Pacific Telephone & Telegraph Co.	29/37/7	Denied	Jury Verdicts Weekly
1,400,000	Fox v. Hobie Coast Catamaran	29/28/29	Remitted to $1.1 million	Morton Caplan Attorney for Defendant
1,360,000	Bettencourt v. Fireman's Fund Insurance Co.	29/47/13	Denied	Jury Verdicts Weekly
1,085,000	Orsatti v. Farmer	29/46/20	Remitted to $0	Robert Wilson Attorney for Defendant
1,060,000	Feldman v. Fox and Carskadon	29/38/9	Remitted to $250,000	Jury Verdicts Weekly
1,007,500	Bryant v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.	29/21/71	Remitted to $151,000	Jury Verdicts Weekly

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on May 29, 1987, I served the within *Motion for Leave to File Brief and Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Theodore B. Olson
Larry L. Simms
Gibson, Dunn & Crutcher
1050 Connecticut Avenue,
N.W.
Washington, D.C. 20036
(202) 955-8500
Counsel for Appellant

J.P. Janetatos
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 298-8290
Counsel for Appellee

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 29, 1987, at Los Angeles, California.

Siri Ved K. Khalsa
(Original signed)

Supreme Court, U.S.
FILED
JUL 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

Bankers Life and Casualty Company,
Appellant,

V.

Lloyd M. Crenshaw,
Appellee.

On Appeal from The Supreme Court of Mississippi

BRIEF OF AMICUS CURIAE NATIONAL INSURANCE CONSUMER ORGANIZATION IN SUPPORT OF APPELLEE

Jay Angoff
National Insurance
Consumer Organization
121 N. Payne Street
Alexandria, VA 22314

Counsel for Amicus Curiae

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No. 85-1765

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

Bankers Life and Casualty Company,
Appellant,

V.

Lloyd M. Crenshaw,
Appellee.

On Appeal from The Supreme Court of Mississippi

BRIEF OF AMICUS CURIAE NATIONAL INSURANCE CONSUMER ORGANIZATION* IN SUPPORT OF APPELLEE

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* This brief is filed with the written consent of the parties, copies of which are on file with the Court.

INTEREST OF AMICUS CURIAE

The National Insurance Consumer Organization (NICO) is a non-profit, non-partisan consumer organization with approximately 2,000 individual members. It is the only national consumer organization which devotes its full time to insurance matters. It was founded in 1980 by J. Robert Hunter, Federal Insurance Administrator under Presidents Ford and Carter, who is NICO's president and a member of its Board of Directors. NICO's other Directors are Howard Clark, a former South Carolina Insurance Commissioner, and James Hunt, a former Vermont Insurance Commissioner.

NICO receives frequent complaints from its members and other insurance policyholders about alleged misconduct by insurance companies, and suggests various

remedies that such policyholders may have. Because Bankers Life is asking this Court to emasculate the most effective remedy policyholders have -- the insurance bad-faith action -- NICO and those it represents have a direct and substantial interest in this case.

In addition, during the last two years the insurance industry has conducted a massive and misleading public relations campaign designed to pursuade legislators to limit the ability of injured individuals to recover damages, including punitive damages, in court. That campaign rests on the false premise that the costs of punitive damages outweigh their benefits. Because Bankers Life now carries that campaign and that false premise into this Court, NICO has an interest in responding in this Court.

STATEMENT OF THE CASE

Amicus NICO adopts appellee Crenshaw's statement of the case.

SUMMARY OF ARGUMENT

Public policy demands that courts and juries not be stripped of their authority to award punitive damages against insurance companies found to have engaged in outrageous misconduct. Punitive damages are the only effective punishment for and deterrent to such misconduct; they are a well-deserved reward for a plaintiff who has brought a wrongdoer to justice; they compensate the plaintiff for otherwise uncompensable expenses of litigation; and they provide a sense of satisfaction to the wronged individual that violent action against the wrongdoer provides in societies less civilized than ours.

While the benefits of punitive damages are thus direct and substantial, their costs are minimal. The insurance industry has sought to persuade the public, and now this Court, that punitive damage payments are out of control; the empirical evidence demonstrates, however, that this claim is false.

The Eighth Amendment was intended and has always been interpreted to apply to criminal cases, not civil cases, and to protect individual rights, not corporate rights. Yet even if the Eighth Amendment did apply to punitive damage judgments against corporations, thus invoking proportionality analysis, the punitive damage judgment against Bankers Life in this case would not violate the Eighth Amendment. The Court has held that the deprivation of a lifetime of liberty for dishonestly obtaining $230 is not

disproportionate; therefore, a fortiori, deprivation of no liberty for in effect dishonestly obtaining $20,000, as Bankers Life has done, is not disproportionate.

ARGUMENT

I. PUBLIC POLICY DEMANDS THAT COURTS AND JURIES NOT BE STRIPPED OF THEIR AUTHORIT TO AWARD PUNITIVE DAMAGES WHEN INSURANCE COMPANIES ENGAGE IN OUTRAGEOUS MISCONDUC

The doctrine of punitive damages is "accepted as settled law by nearly all state and federal courts, including this Court." Smith v. Wade, 461 U.S. 30, 35 (1982). The doctrine serves several beneficial purposes, all of which are all well-served by punitive damage judgments in insurance bad faith cases, and are particularly well-served by the punitive damage judgment in the instant case.

Most obviously, punitive damages punish the defendant. Smith, 461 U.S. at 54; Bankers Life and Casualty Co. v. Crenshaw, 483 So.2d 254, 268-69 (Miss. 1985). The punitive function of punitive damage judgments against insurance companies is particularly important because insurers are as a practical matter exempt from other methods of punishment. First, because they are artificial rather than natural persons, they can be subjected to neither the death penalty nor incarceration. Second, as appellant makes clear, the statutory penalty for outrageous misconduct by insurance companies in most states is a token one. Bankers Life Br. at 14, 34, 35. In Mississippi, for example, it is $1,000, or about 3/10,000 of 1% of appellant's net worth. Miss. Code Ann. Sec. 83-5-33 (1972). Third, state insurance departments frequently have neither the

willingness nor the ability to meaningfully regulate insurer conduct. When insurance companies engage in misconduct, according to a study of state insurance regulation by the United States General Accounting Office (GAO) in 1979, "the authority of departments to order corrective action is very limited." United States General Accounting Office, Issues and Needed Improvements in State Regulation of the Insurance Business, at ii. (1979). In addition, as the GAO rather delicately put it, "insurance regulation is not characterized by an arms-length relationship between the regulators and the regulated," with insurance commissioners typically coming from and returning to the industry. Id. at vii. Finally, insurance companies are exempt from federal regulation under the McCarran-Ferguson Act.

1/ Even companies that engage in the most reprehensible, bad-faith dealings with their policyholders, therefore, know that the federal government can not punish them. In short, the only punishment that can be "felt" by an insurance company is a punitive damage judgment.

The second purpose of punitive damages is deterrence, of both the defendant and others. Smith, 461 U.S. at 54; Bankers Life, 483 So.2d at 268-69. Because of the lack of effective oversight of insurance by government, punitive damages are the only real deterrent to bad-faith conduct by insurance companies, just as they are the only meaningful punishment for such conduct. Compensatory damages, since they

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1/ 15 U.S.C. Sec. 1011 et seq. The McCarran Act also substantially exempts the business of insurance from the antitrust laws.

are limited to the amount of the plaintiff's claim, offer no deterrent. To hold an insurer found to have refused in bad faith to pay a valid claim liable only for the amount of that claim is tantamount to requiring a convicted armed robber only to make restitution of the money he stole. No one would argue that restitution by armed robbers is a meaningful deterrent to armed robbery; neither can one reasonably argue that compensatory damages are a meaningful deterrent to insurance company bad faith. See Bankers Life, 483 So.2d at 269, quoting Standard Life Ins. Co. v. Veal, 354 So.2d 239 (Miss. 1978) ("If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity.") See also Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961) ("In the calculation of his

expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business."); Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1185-88 (1931) (recommending punitive damages "where the risk of having to pay compensation probably would not discourage the commission of wrongs.").

Third, punitive damages reward the plaintiff for performing the public service of bringing a wrongdoer to justice. Bankers Life, 483 So.2d at 269 (citation omitted). This "reward" function is particularily important where, as here, compensatory damages alone are not of

sufficient magnitude to make it economically feasible for a lawyer to pursue the case, or for a plaintiff of modest means to pay expenses in connection with the case -- particularly in view of the ability of insurers, with resources thousands of times greater than the plaintiff's, to simply wear him down during the course of litigation.

The public service performed by plaintiffs who bring insurance bad faith cases is enormous: they encourage insurance companies to deal more fairly with their policyholders. For example, in 1970 the California Court of Appeal upheld a punitive damage judgment against an insurer which had sought to induce a disabled policyholder into surrendering his policy by writing him false and threatening letters. Fletcher v. Western National Insurance Co., 10 Cal. App.3d 376, 89 Cal.

Rptr. 78 (1970). Soon thereafter, two insurance company lawyers wrote an article advising insurers that Fletcher made it imperative for them to be cautious and fair in handling claims, since "any deviations from ethical business practices will subject them to harsh retromands." 2/ Similarly, a 1976 article in an insurance journal suggested nine steps, including making full disclosure to the insured and paying claims promptly, that insurers should take to avoid punitive damage verdicts. 3/ Dozens of other articles

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2/ Keenan and Gillespie, The Insurer and the Tort of Intentional Infliction of Mental Distress, 39 Ins. Couns. J. 335 (1972).

3/ Kornblum and Thornton, The Seismic Impact of Punitive Damages in Actions Against Insurers, 77 Best's Rev. 36 (1976)

urging insurance companies to reform their claims practices have been written. They do not urge insurers to avoid dealing in bad-faith because it is immoral, but only because it subjects them to the possibility of large punitive damage judgments. 4/

The instant case, if affirmed by this Court, will strongly encourage insurers to deal more fairly with their policyholders. Here, the policy provision under which Bankers Life told Crenshaw his claim was denied required that a loss be caused solely by accidental bodily injury to be compensable. Bankers Life, 483 So. 2d at 270. The Mississippi Supreme Court had

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4/ See generally Levine, Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F.L. Rev. 613 (1979)

since 1966 held that provision invalid, 5/ but Crenshaw had no reason to know it was invalid. Bankers Life therefore, as the court below found, "took the consistent and deliberate choice to deny coverage for an invalid reason." Id. As the court below also observed, other innocent, unknowing policyholders with valid claims may also have had their claims denied for that invalid reason. Id. The judgment in the instant case is likely to have the public benefit of reducing the number of valid claims that insurance companies deny, since presumably Bankers Life will delete the invalid provision from its future policies, as will any other insurance companies which

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5/ Peerless Insurance Co. v. Myers, 192 So.2d 437 (Miss. 1966); Zurich Insurance Co. v. Ruscoe, 203 So.2d 305 (Miss. 1967); Lincoln American Insurance Co. v. Ruscoe, 210 So.2d 769 (Miss. 1968).

currently use the provision. 6/

A fourth purpose of punitive damages is compensation of the plaintiff for expenses he has incurred that are not compensated for by compensatory damages, such as attorney's fees and other litigation expenses. Smith v. Wade, 461 U.S. at 90 (Rehnquist, J., dissenting), 7/ citing D. Dobbs, Law of Remedies 221 (1973); K. Redden, Punitive Damages, Sec.

6/ If insurers do not now delete the invalid provision, of course, they are subject to further punitive damage judgments -- which is both an incentive for Bankers Life and others to delete it, and an argument against limiting punitive damages.

7/ In Smith, in which the Court affirmed a punitive damage judgment against a prison guard found to have inadequately protected an inmate, three justices dissented from the Court's holding that recklessness was a sufficient standard for an award of punitive damages under 42 U.S.C. Sec. 1983. They believed that such an award required

2.4(C) (1980). If Crenshaw receives $20,000 in compensatory damages for Bankers Life's breach of contract, for example, he is not made whole, since he must pay his lawyer and must also pay the expenses of suit. Punitive damages thus provide compensation for such expenses, in addition to serving their other, admittedly more important purposes.

Finally, punitive damages serve the purpose of vengeance. In societies less civilized than ours, individuals harmed by another do not seek to redress their grievances in court but rather seek revenge through violence against the wrongdoer.

"at least some degree of bad faith or improper motive on the part of the defendant." 461 U.S. at 56 (Rehnquist, J., dissenting). Bankers Life's conduct in the instant case clearly meets the standard sought by the Smith dissenters, since Bankers Life "took the consistent and deliberate choice to deny coverage" for a reason it knew was invalid. Bankers Life, 483 So.2d at 270-71. The Smith dissenters

Punitive damages are a socially acceptable surrogate for such vengeance. See Campbell v. Government Employees Insurance Co., 306 So. 2d 525, 531 (Fla. 1974) ("Punitive damages have helped to maintain public tranquility by permitting the wronged plaintiff to take his revenge in the courtroom and not by self-help."); see also Merest v. Harvey, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814) (acknowledging that one purpose of large exemplary punitive damage awards was to prevent dueling); Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 796 (C.P. 1764) (same). They are a highly

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also were somewhat skeptical about whether Congress intended punitive damages to be awarded at all under Sec. 1983, and were concerned that such an award could have three adverse effects. 461 U.S. at 84-92 (Rehnquist, J., dissenting). In the instant case, however, failure to affirm the punitive damage judgment would have those same adverse effects. First, the Smith dissent argued that permitting

civilized way of providing the plaintiff at least some of the satisfaction that more direct action would provide.

Because punitive damages further all the above purposes, their benefit to society is clear and substantial. Thus, even if punitive damages imposed

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punitive damages under Sec. 1983 would discourage public officials from acting decisively because "when swift action is demanded, their thoughts likely will be on personal financial consequences that may result from their conduct." Id. at 88. In contrast, the threat of punitive damages encourages insurance companies to act when swift action is demanded, because they must think of the financial consequences of not acting. Second, the dissent pointed out the "staggering effect of Sec. 1983 claims upon the workload of the federal courts." Id. at 91. In contrast, insurance bad faith cases have had little effect on that workload. They would have a substantial effect, however, if appellant's challenge to punitive damage judgments in state courts is upheld. Third, the dissent argued that when federal courts enforce

substantial costs on insurers, the benefits of punitive damages would justify those costs. In fact, however, the empirical evidence indicates that the costs of punitive damages to insurers are minimal.

In February 1987, for example, the Texas State Board of Insurance analyzed 3,367 claims that had been closed in Texas

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punitive damage judgments against local officials they "intrude into sensitive areas of sovereignty of coordinate branches of our nation, thus implicating the most basic values of our system of federalism." Id. at 92. In contrast, upholding the Mississippi Supreme Court's affirmance of the instant punitive damage judgment would futher the basic values of federalism, while overturning it would be unwarranted intrusion into Mississippi's sovereignty.

The dissent also noted that the compensatory function of punitive damages did not come into play in Sec. 1983 cases, because the statute provided for an award of attorney's fees to a prevailing plaintiff. Id. at 90. No such award, of course, is made in insurance bad faith cases.

between November 1983 and December 1986. The total paid out in those cases was $487,703,243; the total paid out in punitive damages was $100,000, or about 1/50 of 1% of the total. Texas State Board of Insurance, Texas Liability Insurance Closed Claim Study 89 (1987). Punitive damages were assessed in 6/10 of 1% of general liability claims, and 2/10 of 1% of medical malpractice claims. Id. at 32.

Amicus Aetna also conducted a study which concluded that the cost of punitive damages was minimal. To determine the effect on its claim costs of Florida's new "tort reform" law, which included limitations on punitive damages, Aetna analyzed 105 claims it had recently closed. In submitting the analysis, which demonstrated that the new law would have no effect, to the Florida Insurance

Commissioner, Aetna explained that punitive damages had an impact on the claim settlement value in only 2 of the 105 cases. It estimated the total impact to be less than $15,000 -- less than 1/10 of 1% of its total imdemnity payments. 8/

A survey of jury verdicts from over 30 jurisdictions in 10 states by the American Bar Foundation confirms the Aetna and Texas findings. The Foundation found that the percentage of plaintiff's verdicts that included a punitive damage component ranged from 0% in four jurisdictions to a high of 21.6% in Cobb County, Georgia. The

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8/ Letter from Thomas L. Rudd, Superintendent, Insurance Department Affairs - Commercial Lines, Aetna Casualty and Surety Co., to Charlie Gray, Chief, Bureau of Policy and Contract Review, Attachment entitled "Bodily Injury Claim Cost Impact of Florida Tort Law Change," Aug. 8, 1986

percentage for New York City, Cook County, and Los Angeles County -- the three largest metropolitan areas in the nation -- were 1.6%, 2.2%, and 8.6% respectively. American Bar Foundation, Preliminary Report of the Punitive Damages Project 10-11, Feb. 8, 1986.

Finally, even the Rand Corporation's Institute for Civil Justice, which receives approximately half its funding from the insurance industry and most of the other half from major institutions supporting "tort reform," 9/ acknowledges that only about half the amount awarded as punitive damages is ultimately paid out, that punitive damage judgments are most frequent where defendants were found to have

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9/ Rand Institute for Civil Justice, Contributions History, Sept. 7, 1984.

intentionally harmed plaintiffs, and that most punitive damage judgments are modest. 10/

In sum, the benefit of punitive damages is enormous while the cost is minimal. Bankers Life and the insurance industry amici have every right to expand their public relations campaign 11/ against the legal system in general and punitive damages in particular into this Court. But the empirical evidence demonstrates that it is entitled to no weight in this Court.

10/ Rand Institute for Civil Justice, Punitive Damages: Empirical Findings (1987), reported in Liability Week, March 30, 1987, at 2.

11/ In December 1984, for example, the Insurance Information Institute (III), the industry's public relations arm, launched what it called an "effort to market the idea that there is something wrong with the civil justice system in the United States." National Underwriter, Dec. 21, 1984, at 2.

II. THE EIGHTH AMENDMENT DOES NOT APPLY TO PUNITIVE DAMAGES IN CIVIL CASES.

The Eighth Amendment does not apply to punitive damages in civil cases. Ingraham v. Wright., 430 U.S. 651 (1977), is dispositive.

In Ingraham, this Court was faced with

Pursuant to that effort it sent a kit on the "civil justice crisis" to insurance executives and agents urging them to tell their policyholders and the media that "Insurers have no recourse but to cut back on liability insurance until improvements in the civil justice system will create a fairer distribution of liability, reduce the number of lawsuits and create a climate in which insurance can operate more predictably." Insurance Information Institute, "Outline for Speech: Crisis in the Civil Justice System," at 7, attachment to Memorandum from Mechlin D. Moore, President, Insurance Information Institute, to State Presidents and Senior Staff Executives of the Professional Insurance Agents, Nov. 11, 1985. Soon thereafter, the III announced a new $6.5 million television and magazine advertising campaign designed, in the III's words, "to change the widely-held perception that there is an insurance crisis to a perception of a lawsuit crisis." Journal of Commerce, March 19, 1986, at 1, 20. The ads featured polio victims, mothers,

the question whether school officials violated the Eighth Amendment by paddling schoolchildren. Observing that the Eighth Amendment was adopted almost verbatim from the English Bill of Rights, and that "the exclusive concern of the English version

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ministers and high school athletes stating that "doctors are afraid to deliver babies, clergy are becoming reluctant to counsel their congregations, and high schools are thinking about closing down their sports programs" because of the "lawsuit crisis." E.g., Insurance Information Institute, "No One is Immune From the Lawsuit Crisis," The Washington Post Magazine, June 22, 1986. This year, amicus Aetna has been running similar ads. See, e.g., "Justice For All?", The Wall Street Journal, Jan. 23, 1987, at 21. Amicus Johnson & Higgins has also run similar ads. E.g., Johnson & Higgins, "Insurance is Getting Killed in Self-Defense" (1986).

Ironically, now that "tort reforms" have been enacted in several states, the insurance industry has found that "the impact of the [tort] changes generally ranged from marginal to imperceptible." Insurance Services Office, Inc., Claim Evaluation Project, at 4 (1987). See also "No Florida Savings Seen from Tort Law Reform," Journal of Commerce, Oct. 21, 1986, at 1A.

was the conduct of judges in enforcing the criminal law," the Court held that the Eighth Amendment "was designed to protect those convicted of crimes," id. at 664, and thus that schoolchildren who misbehaved in school were not entitled to its protection. The Court reasoned that schoolchildren had little need for the protection of the Eighth Amendment, since the openness of schools to public scrutiny and the supervision of schools by the county provided sufficient protection. Id. at 670.

The Court explained in Ingraham that both the English and American versions of the Eighth Amendment were intended to apply only to "the criminal process," id. at 664, while noting that Blackstone treated each of the three clauses of the English version as "bearing only on criminal proceedings

and judgments." Id. at 665. Even if the English version had been intended to apply outside the criminal process, however, it could not possibly have been intended to apply to punitive damages, since the English Bill of Rights was adopted in 1689, while the first English punitive damage case was not reported until 1763. Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763).

This Court has thus consistently held that the Eighth Amendment protects those convicted of crimes. E.g., Solem v. Helm, 463 U.S. 277 (1982) (life imprisonment for habitual criminal uttering a bad $100 check); Weems v. United States, 217 U.S. 349 (1910) (15 years at hard labor for falsifying a public document); Robinson v. California, 370 U.S. 660 (1962) (90 days in jail for being an addict). It has never held that the Amendment protects anyone

outside the criminal process. 12/ To the contrary, where defendants have claimed that it reaches beyond the criminal process, the Court "has had no difficulty finding the Eighth Amendment inapplicable." Ingraham v. Wright, 430 U.S. at 667-68, citing Fong Yue Ting v. United States, 149 U.S. 698 (1893) (deportation); Uphaus v. Wyman, 360 U.S. 72 (1959) (incarceration for civil contempt). When asked by schoolchildren to apply the Eighth Amendment outside the criminal process 10 years ago, this Court refused to "wrench[ ] the Eighth Amendment from its historical context." 430 U.S. at 669. That historical context has not changed in the last ten years.

12/ In a footnote in Ingraham, the Court left open the possibility that individuals incarcerated not in jails or in prisons but in mental or juvenile institutions might be protected by the Eighth Amendment. 430

III. THE EIGHTH AMENDMENT DOES NOT APPLY TO CORPORATIONS.

In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977), this Court stated that certain "purely personal" Constitutional guarantees do not apply to corporations because "the 'historic function' of the particular guarantee has been limited to the protection of individuals." Id. at 778-79 n.14, citing U.S. v. White, 322 U.S. 694, 698-701 (1944). Whether a constitutional protection is "purely personal" and thus not applicable to corporations, the Court

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U.S. at 651 n.37. It cited In re Gault, 387 U.S. 1 (1967), in which the Court held that the Due Process Clause comes into play in proceedings that may lead to the incarceration of a juvenile. 387 U.S. at 13. The Ingraham Court thus did not leave open the possibility that the Eighth Amendment might apply to punitive damages in civil cases, as Bankers Life disingenuously implies. Bankers Life Br. at 19.

said, "depends on the nature, history, and purpose of the particular constitutional provision." 435 U.S. at 778-79 n.14. Because the nature, history and purpose of the Eighth Amendment indicate that it was intended to protect individual rights rather than corporate rights, this Court should not "wrench[ ] the Eighth Amendment from its historical context," Ingraham, 430 U.S. at 669, by applying it to corporations.

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Excessive Bail Clause can not possibly be applied to corporations, since a corporation by its artificial nature can neither be incarcerated by the government nor released on bail. Since "the Eighth Amendment imposes parallel

limitations on bail, fines, and other punishments," Solem v. Helm, 463 U.S. 277, 289 (1982), it is more logical to read the Amendment in its entirety as devoted to the protection of individual rights than to read part of it as also protecting corporations.

In addition, it is well-established that the Constitution does not protect corporations to the same extent that it protects individuals, since individual "rights are such as existed by the law of the land long antecedent to the organization of the state," whereas "the corporation is a creature of the state." Wilson v. United States, 221 U.S. 361, 383 (1911). Thus, "[c]orporate identity has been determinative in several decisions denying corporations certain constitutional rights," Bellotti, 435 U.S. at 778-79 n.

14, including the privilege against self-incrimination, Wilson, supra, and the right to privacy. California Bankers Association v. Shultz, 416 U.S. 21, 65-67 (1974).

Corporate identity should also be determinative with respect to the Eighth Amendment. For example, in Solem v. Helm, 463 U.S. 285 (1982), in which the Court summarizes the history of the Eighth Amendment, it notes that three chapters of the Magna Carta provided that amercements, or fines, could not be excessive. Chapter 20 protected freemen; Chapter 21 protected the nobility; and Chapter 22 protected the clergy. None protected corporations. 463 U.S. at 285. Bankers Life acknowledges that "the colonists, both before and after the Revolution, regarded Magna Carta and the English Bill of Rights of 1689 as

sources of their individual liberties." 13/ (emphasis supplied). Bankers Life does not claim, nor could it, that those documents granted the specific protections contained in the Eight Amendment to corporations.

Bankers Life also fails to cite a single case -- American or English, modern or ancient -- even suggesting that the Eighth Amendment or any of its antecedents protected corporations. To the contrary, all cases it cites in arguing that punitive damages should be subject to the Eighth Amendment involved individual defendants.

13/ Bankers Life Br. at 24. Appellant also notes that the Pennsylvania Frame of Government of 1682, which was based on the Magna Carta, provided that "all fines shall be moderate, and saving men's contenements, merchandise, or wainage," and that it has been characterized as "the most influential of the Colonial documents protecting individual rights." (emphasis supplied) Id. at 22.

E.g., Earl of Devon's Case, 11 State Tr. 1354 (1689) (30,000 pound fine imposed on Earl of Devon excessive); Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763) (300 pounds in exemplary damages against magistrate upheld); Kennedy v. Mendoza-Martinez 372 U.S. 144, 165-66 (1963) (individual stripped of citizenship entitled to 5th and 6th Amendment protection); Solem v. Helm, 463 U.S. 277 (1982) (life imprisonment for habitual criminal passing bad check held cruel and unusual punishment).

In short, just as the framers of the Constitutional guarantee against compulsory self-disclosure did not intend to protect "economic or other interests of ... organizations so as to nullify appropriate governmental regulations," White, 322 U.S. at 700, the framers of the Eighth Amendment

could not have intended to protect Bankers Life's economic interest so as to nullify the wholly appropriate action of the Mississippi Supreme Court in this case.

IV. EVEN IF THE EIGHTH AMENDMENT APPLIED TO PUNITIVE DAMAGE JUDGMENTS AGAINST CORPORATIONS, THE JUDGMENT IN THIS CASE WOULD NOT VIOLATE THE EIGHTH AMENDMENT.

Under the Eighth Amendment, the punishment must fit the crime. This principle -- "proportionality" -- "is deeply rooted in common law jurisprudence." Solem v. Helm, 463 U.S. 277, 284 (1982). It has been applied to invalidate the death penalty for rape, Coker v. Georgia, 433 U.S. 584 (1977), and for felony murder where the defendant neither took life nor intended life to be taken or lethal force to be used. Enmund v. Florida, 458 U.S. 782 (1982). It has also been applied to invalidate a sentence of 15 years at hard labor for falsifying a public document,

Weems v. United States, 217 U.S. 349 (1910), and one of 90 days for the crime of being an addict. Robinson v. California, 370 U.S. 660 (1962). Most recently, this Court applied the principle in invalidating a sentence of life imprisonment without parole for uttering a bad $100 check, where the defendant had previously been convicted of six non-violent felonies. Solem v. Helm, supra.

On the other hand, this Court declined to apply the proportionality principle in upholding a 40 year prison sentence for possession and distribution of nine ounces of marijuana. Hutto v. Davis, 454 U.S. 370 (1982). Nor did the Court apply the principle when it upheld a mandatory life sentence for obtaining $120.78 by false pretenses, $80 by fraudulent use of a credit card, and $28.36 by passing a forged

check. Rummel v. Estelle, 445 U.S. 263 (1980).

It is clear, therefore, that "successful challenges to the proportionality of particular sentences will be exceedingly rare." Solem, 463 U.S. at 290-91. All such challenges have been made under the Cruel and Unusual Punishments Clause of the Eighth Amendment; this Court has never held a fine disproportionate and thus violative of the Excessive Fines Clause, either in a criminal or civil case.

Applying proportionality analysis to the instant case presents serious practical problems. Bankers Life is a corporation whereas all other defendants alleging disproportionate punishment have been individuals; Bankers Life is a civil defendant whereas all other such defendants have been criminal defendants. Bankers

Life has been ordered to pay money whereas all other proportionality defendants faced death or imprisonment; Bankers Life owes money to a private party, whereas all other defendants "owed" their sentences to the government. Nevertheless, we now apply Eighth Amendment proportionality analysis to the instant case to the extent possible, and show that under that analysis the punitive damage judgment against Bankers Life would not be disproportionate.

In Solem v. Helm, the Court set out three factors, gleaned from prior cases, to be used in determining whether a punishment is proportionate to a crime. First, the Court considered the gravity of the offense and the harshness of the penalty. It found that Helm's offense -- uttering a bad $100 check after six non-violent felony convictions -- was relatively minor.

Helm's penalty of life imprisonment without parole, on the other hand, was the "penultimate penalty." 463 U.S. at 303. The only harsher penalty is death. Id. at 297. In contrast, Bankers Life has been deprived of neither life nor liberty. Its punishment is therefore less harsh than not only Helm's life sentence but also Rummel's life sentence and Davis's 40 year sentence, both of which this Court affirmed. Moreover, whereas Helm passed a bad $100 check, Rummel fraudulently obtained $230 and Davis sold nine ounces of marijuana, Bankers Life in effect stole $20,000 from Mr. Crenshaw, by refusing to pay him $20,000 which it knew it had a legal duty to pay. 14/ Thus, Bankers Life has been

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14/ Aggravating circumstances were Bankers Life's offering Crenshaw an explanation it both knew was illegal and knew Crenshaw would not know it was illegal.

punished less severely than Helm, Rummel or Davis for committing a crime much more serious than that committed by Helm, Rummel or Davis.

Second, the Solem court considered the sentences imposed on other criminals in the same jurisdiction. It found that Helm, a resident of South Dakota, received the maximum sentence that could be imposed in South Dakota and had been treated as or more harshly than other criminals in South Dakota who had committed more serious crimes -- including murder, treason, arson and kidnapping. Id. at 298-99. In contrast, Bankers Life has been treated much more leniently than those who have committed less serious offenses in Mississippi. A man convicted of stealing $100, for example, may be punished by five years in prison, as well as a fine of $1,000 -- 3% of average household net worth

of $32,667. 15/ Miss. Code Ann. Sec. 97-17-41 (1972). For in effect stealing 200 times $100, Bankers Life has been deprived of no liberty, and of 1/2 of 1% of its net worth.

Third, the Solem court considered the sentences imposed for commission of the same crime in other jurisdictions. It found that in only one other state could Helm have even arguably received as severe a sentence as he did in South Dakota. Id. at 299-300. In contrast, while approximately 15 states bar or substantially limit punitive damages, 16/ in a majority of states Bankers Life

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15/ U. S. Department of Commerce, Bureau of the Census, Household Wealth and Asset Ownership: 1984, at 1 (latest year for which figures are available).

16/ See Ghiardi and Kircher, Punitive Damages, Sec. 4, Table 4-1, at 26-30 (Supp. 1986); Liability Week, June 29, 1987, at 12.

could have been punished more severely than it was in Mississippi.

Application of each of the three factors the Court considered in Solem to the instant case thus indicates that the punitive damage judgment against Bankers Life is not disproportionate. 17/ In addition, this Court found that the deprivation of 40 years liberty for possessing and distributing nine ounces of marijuana is not disproportionate, and that deprivation of a lifetime of liberty for dishonestly obtaining $230 is not disproportionate. Therefore, a fortiori,

---

17/ Bankers Life attempts to make much of the difference between the $1.6 million in punitive damages and the $20,000 compensatory damages assessed against it. The principle of proportionality elucidated by this Court, however, refers to proportionality between the punishment and the crime, not between punitive damages and compensatory damages.

deprivation of no liberty for dishonestly obtaining $20,000 is not disproportionate.

CONCLUSION

By using the Eighth Amendment to attack a punitive damage judgment against a major corporation in a civil case, Bankers Life seeks to transform a Constitutional protection of individual rights in criminal cases into a Constitutional limitation on individual rights in civil cases. Nothing in the decisions of this Court, nor in the history of the Eighth Amendment or its antecedents, can support such a perverse result.

If the insurance consumer is to be protected, the punitive damages remedy must be maintained and strengthened. Otherwise, he is overmatched by an industry which is exempt from regulation by the federal government and ineffectively regulated by

state governments, and which possesses resources sufficient to mount a nationwide public relations campaign attacking the common law. The courts, and ultimately this Court, are the last best hope of the insurance consumer. The judgment of the Mississippi Supreme Court should be affirmed.

Respectfully submitted,

Jay Angoff,
National Insurance
Consumer Organization
121 N. Payne Street
Alexandria, VA 22314
(703) 549-8050

Counsel for Amicus Curiae

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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF THE ARIZONA TRIAL LAWYERS ASSOCIATION, THE CALIFORNIA TRIAL LAWYERS ASSOCIATION, AND THE NEVADA TRIAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEE

Of Counsel:
IAN HERZOG
Chairman, Amicus Committee
10880 Wilshire Boulevard
Suite 1900
Los Angeles, CA 90024
(213) 475-0871
Attorney for Amicus Curiae California Trial Lawyers Association

ALLAN R. EARL
Chairman, Amicus Committee
Nevada Trial Lawyers Association
710 South 4th Street
Las Vegas, Nevada 89101
(702) 386-0000
Attorney for Amicus Curiae Nevada Trial Lawyers Association

G. DAVID GAGE
(Counsel of Record)
AMY LANGERMAN
Chairman, Amicus Committee
101 N. First Ave.
Suite 1575
Phoenix, AZ 85003
(602) 258-2102
Attorneys for Amicus Curiae Arizona Trial Lawyers Association

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BRIEF OF THE ARIZONA TRIAL LAWYERS ASSOCIATION, THE CALIFORNIA TRIAL LAWYERS ASSOCIATION, AND THE NEVADA TRIAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST

With the consent of the parties, the Arizona Trial Lawyers Association; the California Trial Lawyers Association; and the Nevada Trial Lawyers Association respectfully submit this brief as amici curiae in support of appellee. The copies of the letters of both parties confirming this consent have been filed with this Court.

The Arizona Trial Lawyers Association ("AzTLA"), founded in 1969, is a voluntary organization comprised of approximately 875 trial lawyers. The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization comprised of approximately 5,000 trial lawyers. The Nevada Trial Lawyers Association

("NTLA"), founded in 1966 is a voluntary organization with over 800 members.

Members of these associations regularly appear in both state and federal court. The predominant practice of most AzTLA, CTLA, and NTLA members is in the representation of injured tort victims and victims of consumer fraud.

These Associations, through their appropriate officers and committees, have authorized the participation in this case as amici curiae.

Amici are concerned that the position taken by appellants and amici counsel, in support of appellants, is another attempt to tamper with state tort law remedies which have been the only effective means of curbing oppressive insurance claims practices and deterring other commercial torts.

The insurance industry's attempt to restrict or eliminate punitive damages, the strongest deterrent to tortious conduct, shows that, unfortunately, major insurers are more interested in profits than in preventing wrongful and tortious misconduct towards policyholders.

We believe that a reversal of the decision of the Supreme Court of Mississippi would harm large segments of our society and would violate fundamental principles of our federalism.

SUMMARY OF ARGUMENT

For more than a century, punitive damages have been a legitimate and accepted component of state tort law. Punitive remedies have been developed by the individual states in response to each state's policies and needs to deter aggravated misconduct. Though there has been some variation among the states, punitive damagaes have developed and have been controlled by the states within traditionally accepted principles and guidelines. Such

remedies continue to evolve as a legitimate expression of state regulation and civil justice.

Punitive damages have developed in particular as the most effective means by which the states can protect their citizens against corporate misconduct. They have been especially important in controlling the powerful and largely unregulated insurance industry. Far from creating a "crisis" in the insurance industry, such damage assessments by state courts are playing a crucial role in reforming long standing claims abuses. The industry's dislike of such awards is not a legitimate reason to tamper with state tort law and upset basic values of our system of federalism.

ARGUMENT

I. IT IS A STATE'S RIGHT TO DETERMINE ITS TORT LAW, AND THE RULES AND METHODS OF COMPENSATION AND PENALTIES WITHIN THAT TORT LAW.

This Court has often recognized that regulating undesirable conduct within its borders is the province of the State, and that therefore a State's interest in fashioning its rules of tort law is "paramount." *Martinez v. State of California*, 444 U.S. 277, 282, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980). Such recognition has included not only "the States' traditional authority to provide tort remedies to their citizens," *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984), but also the recognition that punitive damages are an accepted and legitimate part of traditional state tort law. 464 U.S. at 255, 104 S.Ct. at 625.

In *Silkwood*, the Court upheld an award of punitive damages under Oklahoma law for wrongful conduct by a corporation operating a nuclear power plant even though the defendant was also regulated to some degree by the federal Nuclear Regulatory Commission, and subject to federal fines. In so doing, the Court affirmed the

punitive award as a legitimate regulatory function of the State. *Id.*

The remedy of punitive damages was discussed at length by the Court in *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632. In its decision affirming an award of exemplary damages under 42 U.S.C. § 1983, the Court had occasion to review the common law of torts both in modern times and at the time the statute was enacted. The majority opinion noted that the doctrine of punitive damages had been "accepted as settled law by nearly all state and federal courts, including this Court," as far back as the latter part of the last century. *Id.*, 461 U.S. at 35.

While explaining its decision in *Smith* affirming an award of punitive damages for conduct amounting to reckless or callous disregard, the Court discussed the fact that the various states had formulated slightly varying standards for exemplary awards. *Id.*, 461 U.S. 47-48. Recognizing that some states actually required ill will or intent to injure before allowing punitive awards, the Court adopted the view of the *Restatement (Second) of Torts* in conjunction with 42 U.S.C. § 1983 actions, endorsing exemplary damages when a defendant demonstrates "reckless indifference to the rights of others." 461 U.S. 46-51.

In his dissent, Justice Rehnquist argued that, where the cause of action was based on federal statute, a wrongful intent requirement was appropriate before punitive damages could be awarded. Even Justice Rehnquist, however, noted that his reasoning did *not* apply with equal force in regard to a state's legitimate formulation of tort law and remedies, including punitive remedies:

> While state courts may choose to adopt such measures as they deem appropriate to punish officers [parties] of the jurisdiction in which they sit, the standards they choose to adopt can scarcely be taken

> as evidence of what it is appropriate for a federal court to do.

Id., 461 U.S. at 92.

Preventing and punishing wrongdoing within their borders has always been "much more the business of the States than it is of the Federal Government." *Patterson v. New York*, 432 U.S. 197, 201, 97 S.Ct. 2319, 2322, 53 L.Ed.2d 281 (1977). Thus, a state's ability to fashion its own tort law is, and has always been, a basic component of our federalism.

Bankers Life, under the guise of arguing constitutional protections, would have the Court abandon that federalism and restrict or eliminate punitive damage remedies formulated by the states. Such an invasion of the states' function and province is neither necessary nor justified by the alleged concerns of the insurance company.

As will be shown on the following pages, the states' punitive damage remedies have proven a vital and effective means of curbing corporate misconduct in the various states, particularly against the all-powerful, and largely unregulated insurance industry. Further, the howls of protest voiced by the industry in connection with the issue are both overstated and unjustified.

II. PUNITIVE DAMAGES HAVE EVOLVED AND BEEN REFINED THROUGH STATE TORT LAW TO BE AN EFFECTIVE MEANS OF DETERRING MISCONDUCT.

In *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), this Court recognized that "having the power to make decisions and to set policy is what gives the State its sovereign nature." 456 U.S. at 761. The Court went on to note that the ability of a state "to consider and

promulgate regulations of its choosing must be central to a State's role in the federal system." *Id.*

An important rationale for that view of the State's role is set forth in the concurring and dissenting opinion of Justice O'Connor:

> Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.

Id., 456 U.S. at 788.

That is precisely what has occurred in the area of exemplary damages. State courts throughout the country have developed punitive damages to meet particular situations. Punitive damage law has been a somewhat flexible doctrine, applied in the various states with appropriate guidelines and standards to effectuate its purpose. (See discussions by both the majority and dissent in *Smith v. Wade, supra,* recognizing the variations among the various states over time in regard to punitive awards.)

Punitive damage law, like tort law in general, has evolved and progressed in the various states in accordance with the needs of the people and the resources of the civil justice system in those states. The flexibility of the states to develop the doctrine has been reflected not only in the standards for such awards, but in the manner in which such awards have been authorized.

Punitive damages, for example, are a product of the common law in Arizona.[1] In California and Nevada punitive damages are based on statutory authority.[2] In the latter states the people have spoken through elected

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[1] *Hawkins v. Allstate Ins. Co.*, —— Ariz. ——, 733 P.2d 1073 (Ariz. 1987).

[2] Cal. Civil Code, § 3294; Nev. Rev. Stat. § 42.010.

representatives to establish punitive damages and the standards for such damages. In Arizona the people have spoken through their courts to establish the remedy of punitive damages and the standards for such damages.[3]

Although the standard of misconduct justifying punitive damages in each of the aforesaid states may vary somewhat, they all have a common denominator of requiring aggravated or intentional misconduct.

While every state has established its own factors and guidelines for the jury to consider in determining the amount of a punitive damage assessment, a common requirement is that the size of the award be related to the wealth of the defendant.[4] That is necessarily true if the award is to furnish an effective deterrent to such conduct in the future. As stated in *Pistorius v. Prudential Insur. Co.*, 123 Cal.App.3d 541, 554, 176 Cal.Rptr. 660 (1981):

> [The] function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.

In reference to "cases involving deceptive business schemes operated for profit and often victimizing numerous members of the public," the Idaho Court noted:

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[3] Examples of punitive damage authority and standards from the three state lawyer associations represented in this brief are being used for illustrative purposes.

[4] In Arizona, factors include such things as wealth and income of the defendant, the extent of the misconduct, the duration of the misconduct, the harm caused and the profitability of the misconduct. *Hawkins, supra.* In California, the factors to be considered in assessing punitive damages are the particular nature of defendant's acts and the wealth of the particular defendant. *Neal v. Farmers Ins. Exchange*, 148 Cal.Rptr. 389, 582 P.2d 980 (1978). In Nevada, the factors to be considered in assessing the amount of punitive damages are the wealth of the defendant, the wrongfulness of the acts, and "the punitive amount that would promote the public interest without financially annihilating the defendant." *Nevada Cement Co. v. Lemner*, 89 Nev. 447, 514 P.2d 1180 (1973); *Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 682 P.2d 190 (1984).

> Clearly in such cases the award of exemplary damages should aim at making the cost of such repetitive antisocial conduct uneconomical. . . . A generous award of exemplary damages served to remove the profit factor from the whole scheme. . . .

Cox v. Stolworthy, 94 Idaho 683, 496 P.2d 682, 690 (1972).

Recently, there has been a trend in several of the states to raise the standard for reprehensible conduct on the part of the defendant which must be established before a punitive award will be allowed. For example, while this Court recognized in *Smith v. Wade, supra*, the propriety in a federal case for awarding punitive damages based on a "recklessness" standard, Arizona has rejected "recklessness" as sufficient grounds for such an award. Arizona now requires proof that defendant acted with an evil mind. The requisite evil mind is found only if the defendant intended to injure the victim, or "consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to the [plaintiff]." *Hawkins v. Allstate, supra.*[5]

Some states, on policy grounds, have also required plaintiffs to meet a higher burden of proof before an award of exemplary damages will be allowed. Wisconsin and Arizona are both examples of states which have adopted a "clear and convincing evidence" burden of proof for punitive damages.[6]

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[5] Similarly, both California and Nevada require stricter standards in order to justify punitive awards. Statutes in both California and Nevada permit punitive damages only if there is "fraud, malice or oppression," Cal. Civil Code § 3294; Nev. Rev. Stat. § 42.010. Mississippi uses the "recklessness threshold"—the test approved by this Court in *Smith v. Wade, supra.*

[6] Both states, after considering the history of reliance upon the previous "preponderance" standard, as well as the burden upon the courts if every punitive damage case were required to be retried, applied the higher standard *prospectively*—that is, to cases which

The clear picture which emerges is that the individual states have acted responsibly and responsively in formulating punitive damage law in conformance with the goals and objectives of each individual jurisdiction.

III. PUNITIVE DAMAGES HAVE DEVELOPED AT THE STATE LEVEL AS THE ONLY EFFECTIVE PROTECTION AGAINST FRAUD AND OPPRESSION BY CORPORATE GIANTS.

Governmental sanctions over the years have been notoriously inadequate in curbing corporate wrongdoing. That is no doubt due, in part, to a corporation's immunity from the threat of criminal prosecution with its inherent weapons of loss of liberty and personal humiliation. In those rare cases where individual officers of corporations have been prosecuted, punishment has been woefully lax in comparison with the enormous amounts of money to be gained by wrongful activity. A study in *U.S. News and World Report* entitled "Corporate Crime —The Untold Story," September 6, 1982, at 25-28 states:

> In comparison with the prison terms routinely dealt out to robbers and muggers, corporations and their executives, like other white-collar criminals, get off easy. Most offenses with which corporations are charged carry low fines that have not changed in years and, at worst, are minor irritants.
>
> . . . .
>
> When Westinghouse Electric Company pleaded guilty in 1978 to charges involving bribery of an Egyptian official, the maximum fine was $300,000—one percent of the value of the 30-million-dollar contract it had obtained.
>
> . . . .
>
> Even when convicted and punished, it is not unusual for an executive to be welcomed back into the company's hierarchy.

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had not yet been tried at the time of announcement of the new rule. *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980); *Hawkins v. Allstate*, 733 P.2d at 1080.

For citizens of the states, punitive damages represent the only realistic protection against fraud, oppression and intentional injury by corporate giants. The average consumer or insured who is cheated or lied to can rarely afford to protect himself or obtain justice because actual damages will not support the legal expense of bringing the wrongdoer to justice.

In the corporate world, as everywhere else, there are examples of good and bad. As stated by Robert Miles, Associate Professor of Business Administration at Harvard University, "some firms are 'real Neanderthals,' money-grubbing and ethically insensitive, while others are law-abiding and socially conscious." *Id.*

In certain areas, misconduct has been especially widespread:

> In a few instances, almost entire industries have been caught breaking the law.
>
> . . . .
>
> When a corporation gets into trouble, whether the charge is price fixing, bribery, kickbacks, tax evasion or pollution, the frequent explanation is: "Everybody does it." It is an idea that soothes the consciences of the culprits, and sometimes it is almost literally true. (*Id.*)

In such situations, where a corporate defendant has acted, and continues to act, in violation of the rights of a large group of people solely for the calculated purpose of making more money, punitive damage awards by state courts are the only effective remedy. In *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 233 N.Y.S.2d 488 (1961), the Court observed:

> One who acts out of anger or hate, for instance, in committing assault or libel, is not likely to be deterred by the fear of punitive damages. On the other hand, those who deliberately and cooly engage in a far-flung fraudulent scheme, systematically conducted for profit, are very much more likely to pause and

> consider the consequences if they have to pay more than the actual loss suffered by an individual plaintiff. An occasional award of compensatory damages against such parties would have little deterrent effect. A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Id., 10 N.Y.2d at 406, 179 N.E.2d at 499, 223 N.Y.S.2d at 492. *See also, Boise Dodge v. Clark,* 92 Idaho 902, 453 P.2d 553 (1969).

Such awards are especially essential where compensatory damages are small in relation to the defendant's wealth and can be readily absorbed as a cost of doing business. Our state courts have recognized the importance of punitive damages under such circumstances. *Ward v. Taggart,* 51 C.2d 736, 336 P.2d 534 (1959), noted:

> Courts award exemplary damages to discourage oppression, fraud, or malice by punishing the wrongdoer. (See McCormick, *Damages,* § 279; *Morris, Punitive Damages in Tort Cases,* 44 Harv.L.Rev. 1173, 1185-1188.) . . . Such damages are appropriate in cases like the present one, where restitution would have little or no deterrent effect, for wrongdoers would run no risk of liability to their victims beyond that of returning what they wrongfully obtained.

Id., 51 C.2d at 743, n. 14-15.

As will be discussed in the following section, that is especially true in regard to the insurance industry.

IV. PUNITIVE DAMAGES UNDER STATE TORT LAWS ARE AN EFFECTIVE MEANS OF DETERRING CORPORATE MISCONDUCT AND THE ONLY REALISTIC PROTECTION FOR CONSUMERS FROM DISHONEST AND OPPRESSIVE INSURANCE PRACTICES.

The increase in punitive damage assessments against corporations can, in large measure, be attributed to the increase in insurance bad faith litigation. From the reported cases it appears that fraudulent, malicious and oppressive conduct by insurance carriers runs rampant.

Sometimes the attitude of the companies is one of defiance and contempt when courts try to encourage fair and reasonable claim practices. In *Tibbs v. Great American Ins. Co.*, 755 F.2d 1370, 1376 (9th Cir. 1985), the company's response to the judge's advice to provide legal defense on a claim, was "F--- the Judge," and "no court of law is going to tell us what to do." Punitive damages can help remove an aura of arrogance and insolence that has permeated the industry.

The insurance industry has remained free of federal regulation through the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which effectively eliminated federal regulation by transferring responsibility to the states.[7]

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[7] In *Paul v. Virginia*, 75 U.S. 168 (1868), this Court removed insurance from the field of federal regulation through the Commerce Clause, thereby leaving the matter to the state courts and state insurance commissioners. Ashley, *Bad Faith Actions*, § 9:02, explains that thereafter:

> The latter proved ineffective in controlling insurance abuses: the commissioners usually came from the ranks of the insurance industry and, after short tours of duty, returned to the companies they had regulated.
>
> In 1944, however, the Supreme Court issued its decision in United States v. South-Eastern Underwriters Association. . . . This decision sent shivers down the spines of insurance company executives, who feared the prospect of federal agencies,

Any effective regulation or control of the insurance industry by state insurance departments has remained notably lacking. *See* the Controller General's *Report to the Congress of the United States*, PAD 79-72, Oct. 9, 1979; *see also, N.B.C. Reports*: "Protection for Sale; the Insurance Industry," dated April 17, 1982, an in-depth study of the inability of state insurance departments to properly regulate the insurance industry. The study noted that the insurance industry was too large for any state administrative agency to control, and that:

> WE FOUND ALMOST EVERYWHERE WE WENT—STATE REGULATORS DOING AN INEFFECTIVE JOB. THE FEDERAL GOVERNMENT HAS SHOWN FOR DECADES THAT IT HAS LITTLE INTEREST IN GETTING INVOLVED. AND SO, CONSUMERS END UP HAVING TO TAKE ON THIS SPRAWLING INDUSTRY LARGELY BY THEMSELVES. IT IS NOT A FAIR MATCH. . . .(Capitalization in original.)

Id. at 74.

Insurance company practices as disclosed by reported cases can only be described as shocking in view of the fact that it is an industry affected with a public interest; an industry which represents that it will afford protection in a time of need. The courts have assessed punitive damages based on conduct which was dishonest, malicious and outrageous: *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz. 1987). [For over 18 years the company taught adjusters to cheat by "chiseling" small amounts on claims because policyholders would not perhaps object to these small deductions and it would profit the company by millions each year]; *Moore v. American*

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particularly the Federal Trade Commission, interfering with the insurers' cozy relationships with the state insurance commissioners.

The insurance industry devised an ingenious plan to head off federal regulation. It persuaded Congress to introduce legislation, known as the McCarran-Ferguson Act. . . .

United Life Ins. Co., 197 Cal.Rptr. 878, 150 Cal.App.3d 610 (1984). [Disability insurance benefits denied by use of misleading and deceptive settlement practices firmly grounded in an established company policy that had the potential of defrauding countless insureds other than plaintiff]; *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 693 P.2d 348 (1984). [Disability and medical insurance benefits withheld despite Aetna's interoffice memos indicating its position was questionable—only after insured's suicide was the file marked "urgent" and nine months of withheld benefits paid]; *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 201 Cal.Rptr. 528 (1984). [A large judgment in excess of liability policy limits when "Allstate wilfully manipulated its own client," and "deliberately concealed adverse reports . . . from their own insured"]; *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972). [Life insurer's practice was to not pay meritorious claims and to use "economic coercion" to "compromise" valid claims.]

In an early article recognizing the problem along with a practical solution, Professor Thomas F. Lambert, Jr., 35 *ATLA L.J.*, at 224-226, stated:

> Even if Calvin Coolidge was right that "the business of America is business," corporate enterprise does not have a free lance and must fight with the sword of the warrior and not the dagger of an assassin. The logic of the problem at hand is simple. A person who buys life, health and accident, disability or liability insurance is a consumer and deserves legal protection which is realistic. If the law does not vindicate his reasonable consumer's expectations until only years after battling well-heeled corporate entities and then only gives him policy proceeds (plus interest) from which he must deduct the contingent fee and gnawing expenses of litigation, then the insurance industry has every illicit incentive in the word to fight the Bad Fight and nothing to lose (but policy proceeds plus interest). In this context, compensatory and contract damages don't really compensate. As shown by the modern cases and commen-

> taries cited above, redress is readily at hand. Reparation plus admonition are urgently required, and the law must play professor to a recalcitrant industry by the imposition of deserved civil punishment via punitive damages.

Punitive damages help to give policyholders some semblance of protection. The importance of punitive damages is summarized in an article entitled, "Insurance Company Bad Faith Law—A Potent Weapon for Consumer Protection," by William M. Shernoff, *Trial*, May 1981, at 24, as follows:

> [T]he imposition of punitive damages in a handful of bad faith cases in California has without a doubt generated a more thorough review by the insurance industry of its claims practices than was accomplished by ten years of legislative efforts to regulate insurance claims practices. . . .

Punitive damages have played an "increasingly significant role in protecting contemporary society from many non-regulated or inadequately regulated businesses and industries . . . ." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613, 615 (1979).

These societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society. Professor Levine explains:

> Comparing the regulatory function of punitive damage verdicts to the function of "regulatory" agencies reflects the effective simplicity of exemplary damages rules of law administered by judges and jurors and the ineffective complexity in the maize of administrative agencies and regulations. Paradoxically, from an economic perspective, the cost of regulation through a punitive damage sanction is borne by the insurer acting wrongfully and not by taxpayers supporting an ineffective administrative agency.

Levine, *supra*, at 627 (1979).

As a result of these verdicts, insurers who were being inadequately regulated by administrative agencies are now being regulated and the conduct of the entire insurance industry is being reformed to conform to the reasonable interests and expectations of the public.

V. THE PUNITIVE DAMAGE REMEDY AS PART OF STATE TORT LAW HAS NOT CREATED A "CRISIS" AS CLAIMED BY THE INDUSTRY.

The Appellant and Amici "cry wolf" by expressing outrage and concern over punitive damage assessments. The most recent analysis of the "crisis" by a business publication states:

> During the 1986 crisis, the industry embarked on a splashy public relations campaign proclaiming that the "insurance crisis" was really a "lawsuit crisis." Some three dozen states did make minor changes in the law. But the insurance crisis has abated without help from an overhaul of the nation's civil justice system.
>
> Cool analysis is discrediting last year's horror stories about an epidemic of multimillion-dollar jury awards for relatively little cause. In a sample of 359 cases in the 1982-85 period, mostly involving product liability, *punitive damages were "insignificant,"* according to a study published by the American Enterprise Institute. *"The civil litigation system is stable,"* says Mark Peterson of the Rand Institute for Civil Justice. Only in mass toxic tort cases, notably those involving asbestos, is potentially enormous cost a real concern. (Emphasis supplied.)

Business Week, May 25, 1987, Finance-Insurance at 123. The industry's alleged punitive damage "crisis" is no more legitimate than the industry's claims of financial distress.[8]

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[8] An investigation by the Government Accounting Office, Congress' investigative arm, found that the insurance industry was healthy and that insurers earned after tax profits of 19 Billion Dollars in 1986, when the insurance "crisis" was at its peak. "The

Other studies, such as the Preliminary Report of the Punitive Damages Project by the American Bar Foundation in 1986 used a statistical analysis and found the following:

> Perhaps what is most interesting . . . in light of the claims made about the incidence of punitive damage awards, is how low the percentage of punitive awards is in a number of sites. For instance, the percentage of reported verdicts in which the plaintiff wins money that include punitive awards is only 1.6% in New York City (all five counties making up New York City combined), 2.2% in Cook County, Illinois (which includes Chicago), and 8.6% in Los Angeles County, California. These three sites represent the three largest cities in the country, and they do not appear, generally speaking, to be facing a punitive damages storm. Punitive damages, in terms of their incidence, are unusual in these sites.
>
> . . . .
>
> These tables reflect one particularly important consistency—punitive damages are not routine across all causes of action (this, or course, may be driven in part by differences in the law). The higher percentages of reported verdicts in the money that include a punitive award are clustered, typically, in a small set of causes of action: personal violence, fraud, false arrest, and insurance bad faith. . . .
>
> . . . .
>
> [T]hese preliminary findings are sufficient to call into question many of the claims made in both professional circles and the mass media about punitive damages as well as the civil justice system generally. Punitive damages are not, in the sites we have studied

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industry's earnings improved from $9.7 billion in 1985 to about $19 billion in 1986." Statement of Wm. J. Anderson, Assistant Comptroller General, General Government Programs, U.S.G.A.O. before the Subcommittee on Commerce, Consumer Protection and Competitiveness, House Comm. on Energy and Commerce, April 21, 1987, page 4.

> at least, routine, nor are they necessarily awarded in amounts that boggle the mind. Relatively high percentages of verdicts with punitive damages appear in only a few sites, yet the median awards are relatively low in these sites. Punitive damages appear to be clustered in certain types of cases, ones that might be expected given the purposes of punitive damages. Extremely high dollar awards do not appear to be the norm, and they tend to appear in only a handful of causes of action which do not account for large proportions of the case load and in which plaintiffs are not as likely to win any money at all. . . .

The insurance industry's concern over the number and size of punitive damage verdicts is misplaced. Given the state of the economy and particularly the healthy financial condition of the insurance industry, it would be expected that the amounts of such verdicts would increase each year. Every state has standards for assessment of punitive damages. One of the universal standards is that in determining the amount necessary to deter, the wealth of the defendant may be considered. Indeed, for punitive damages to fulfill the function of deterrence, it is necessary that such an assessment be considered in relation to the wealth of the defendant. "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." *Bertero v. National General Corp.*, 13 Cal.3d 43, 529 P.2d 608, 624 (1974).

An examination of the financial history of major insurance companies readily explains why the punitive damage trend would necessarily increase in amount if the deterrent purpose of such damages is to be accomplished. For example, one company which writes virtually every line of insurance, has tripled its wealth in the past 10 years from 1.4 Billion to over 4 Billion Dollars. Its 10 year financial history is as follows:

ALLSTATE INSURANCE COMPANY

Year	Net Worth "Surplus" (In Dollars)
1977	1,399,495,467
1978	1,693,533,517
1979	1,981,089,058
1980	2,371,135,879
1981	2,395,168,905
1982	2,822,168,434
1983	3,197,752,369
1984	3,229,029,379
1985	3,676,523,111
1986	4,081,689,528

Source: Best Insurance Reports, and the 1986 Allstate Annual Financial Statements filed with the Arizona Department of Insurance.

Using an insurer's present net worth of 4 Billion Dollars, a punitive damage assessment of $1,000,000 for fraud or malice or intent to harm could hardly be considered excessive. The same ratio of punishment to a person with net worth of $10,000 would be $2.50; to a person with a net worth of $100,000 would be a punitive assessment of $25.00; and to a person or company with net worth of $1,000,000, an equivalent punitive assessment would be $250.00. Insurance companies cannot be given preferential and unequal treatment merely because they possess great wealth.

Increases in the number and amount of punitive damage verdicts would also be expected over the past 10 years because of the evolution of the law and the increased awareness and knowledge by the courts of commercial torts. Not only has there been heightened recognition that intentional and profitable civil misconduct should not be protected or condoned, but the civil justice system through reported decisions has educated the courts regarding dishonest business schemes which were not rec-

ognized 10 or 15 years ago. Each reported insurance bad faith case seems to uncover additional schemes used to cheat policyholders of the protection they had purchased.

An example is an unfair claims practice which was discovered seven years ago in a state which did not recognize insurance bad faith. The practice therefore went unpunished. *Hoffman v. Allstate Ins. Co.*, 85 Ill.App.3d 631, 407 N.E.2d 156 (1980). In *Hoffman*, the company used a "cleanup" deduction on a total loss auto collision claim to reduce pay-out, and got away with it, as explained in the case:

> [O]ne of the defendant's adjusters, Jack Dooley, informed plaintiff that defendant deemed the car a total loss; he tendered and plaintiff accepted a check for $116.37 in full payment of the loss pursuant to the collision coverage. . . . Dooley explained . . . this figure; included . . . deduction of $55 which Dooley said was for "dealer preparation and shampoo," . . . . When plaintiff asked Dooley why such a deduction was made on a totally destroyed car, Dooley responded with words to the effect that "Allstate always does that." The check was returned uncashed to defendant on October 20, 1978. Plaintiff twice requested the location of the car for the purpose of having it appraised and apparently was never given this information.

Id. 407 N.E.2d at 157.

The Illinois Appellate Court, not recognizing insurance bad faith, affirmed the lower court dismissal of tort claims and punitive damages, and stated:

> Count III sounds in tort for fraud, alleging that defendant made "spurious" deductions from the retail value of the car and induced the plaintiff to accept the $116.37 check by representing those deductions as being legitimate.
>
> . . . .
>
> [P]laintiff returned the $116.37 check to defendant uncashed. Consequently, no apparent injury re-

> sulted from any purported reliance on defendant's representations, and the dismissal of Count III was proper.

Id. 407 N.E.2d at 158.

Thus, the plaintiff was left with an ineffective remedy. With no punitvie damages available to him on the claim which remained under Illinois law, there was no incentive for the insurer to change its practices. If an insurance company is held to no more than contractual damages for wrongful conduct in handling an insured's claim, while profiting by such misconduct, it has no incentive to change its illicit practices.

Several years later, the same practice, designed to cheat policyholders out of millions of dollars each year, was addressed in a state recognizing the tort of insurance bad faith and an appropriate punitive assessment was made for the purpose of deterring similar misconduct in the future. *Hawkins v. Allstate Ins. Co., supra.*

In *Hawkins*, the evidence showed that the same company was still using its "cleanup" deduction on every total loss collision claim for the purpose of increasing its profits at the expense of its insureds. The *Hawkins* Court found "the deceptive practices were established company policy" for up to 18 years before the time of trial. The practices were exposed and hopefully deterred in *Hawkins* only because punitive damages were permissible with the advent of insurance bad faith as a tort in Arizona in 1981.[9]

Unfortunately, there will always be the company or individual who will seize upon the opportunity to turn a

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[9] *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981).

quick gain by imposing injury and deceit upon others. To those so disposed, punitive damages are the best response available. The availability of punitive damages in civil litigation will continue to serve the purpose of forewarning other defendants that their energy and finances are more prudently spent improving their own standards and conduct, and operating within existing legal principles. Those who are called upon to account for their conduct will always be assured their day in court, in accordance with historically accepted standards of civil due process. The present standards and procedure reconcile a defendant's interest in incurring monetary judgments only when supported by the evidence, with society's interest in insuring that corporate wrongdoing is both rectified and deterred in the future.

CONCLUSION

The doctrine of punitive damages as developed under state law is a legitimate and effective means of regulating undesirable corporate misconduct within a state's boundaries. Such awards are a proper regulatory function of the states. To restrict such awards based on the insurance industry's discomfort at being sanctioned by the state for misconduct would be to upset our tradition of federalism for all the wrong motives, and, in the process, to unfairly hinder a well-crafted system of public protection.

As said over 100 years ago in *Goddard v. Grand Trunk Ry.*, 57 Me. 202 (1869): "If the courts will . . . let the doctrine of exemplary damages have its legitimate influence . . . great and growing evils will be very much lessened."

Respectfully submitted,

Of Counsel:
IAN HERZOG
Chairman, Amicus Committee
10880 Wilshire Boulevard
Suite 1900
Los Angeles, CA 90024
(213) 475-0871
Attorney for Amicus Curiae California Trial Lawyers Association

ALLAN R. EARL
Chairman, Amicus Committee
Nevada Trial Lawyers Association
710 South 4th Street
Las Vegas, Nevada 89101
(702) 386-0000
Attorney for Amicus Curiae Nevada Trial Lawyers Association

G. DAVID GAGE
(Counsel of Record)
AMY LANGERMAN
Chairman, Amicus Committee
101 N. First Ave.
Suite 1575
Phoenix, AZ 85003
(602) 258-2102
Attorneys for Amicus Curiae Arizona Trial Lawyers Association

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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

v.

LLOYD M. CRENSHAW,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

ROBERT L. HABUSH
777 East Wisconsin Avenue
Suite 2200
Milwaukee, Wis. 53202
(414) 271-0900
President, Association of Trial Lawyers of America

JEFFREY ROBERT WHITE
Counsel of Record
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae

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INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as amicus curiae in support of appellee in this case. Copies of letters from both parties granting their consent to the filing of this brief have been filed with this Court.

ATLA is a voluntary association of approximately 65,000 trial lawyers from every state in the U.S. and several foreign countries. ATLA members primarily represent injured victims of tortious misconduct. ATLA is concerned by the challenge to the punitive damage award presented by appellant and supporting amici in this case. ATLA views the punitive damage remedy as a strong force for safety, individual rights, and corporate good faith.

We are all potential victims of the type of willful or reckless misconduct that punitive damages seek to punish and deter. ATLA believes that limiting the effectiveness of this remedy sacrifices the right of the public to be free of such misconduct to

protect the pockets of those who may seek to profit by such misconduct.

SUMMARY OF ARGUMENT

A Mississippi jury found that Bankers Life and Casualty Co. ("Bankers Life") was guilty of such willful and wanton misconduct in denying Mr. Crenshaw's valid insurance claim that punitive damages were appropriate to punish the company and deter others from engaging in similar misconduct in the future. Bankers Life does not contend that the judgment did not conform to the common law of punitive damages applied by Mississippi courts. Instead, appellant argues that the U.S. Constitution imposes a limit on the amount of punitive damages a state court jury may assess. Specifically, appellant urges this Court to hold that the Excessive Fines Clause of the Eighth Amendment bars an award of punitive damages that is not proportional to the criminal penalty for the same misconduct.

This Court should dismiss this appeal for the fundamental reason that the Excessive Fines Clause does not apply to the states. This Court has never incorporated the Excessive Fines Clause into the Fourteenth Amendment and should not do so here.

The limitation on punitive damages is clearly not essential to an Anglo-American system of ordered liberty. A civil defendant's interest in avoiding large monetary judgments is not particularly weighty. The rule that the jury should fix the appropriate amount of punitive damages, based on the egregiousness of the particular misconduct and the resources of the defendant, has been followed by the great majority of states and recognized by this Court for well over a century. Moreover, state courts and legislatures have effectively protected defendants against excessive awards through other means. Finally, the limitation proposed by Bankers Life is in apparent violation of the right to trial by jury.

In addition, imposing a federal constitutional limit on punitive damages would trample important state interests. Punitive damages are designed to further the social policies that underlie tort law. Making punitive awards predictable in amount would encourage defendants to continue their willful misconduct, treating punitive damage awards as a mere cost of doing business. It would also impair the ability of the states to rely on civil punitive damage awards as a supplement to criminal law enforcement efforts.

Appellant's proposed constitutional rule would also impose onerous burdens upon this Court. To hold that punitive damages are constitutionally equivalent to criminal fines calls into question many other procedural and substantive tort law rules. This Court would be called upon to create a new area of federal punitive damage law under the Eighth Amendment. In addition, this Court would be adding to its docket appeals from all the states presenting fact-bound issues of proportionality of punitive damage judgments.

Even if this Court should determine that the Excessive Fines Clause is applicable to the states, that constitutional provision is limited to fines imposed in criminal proceedings. This Court has held that the Eighth Amendment does not apply to civil actions. There is no support for the notion that the drafters of the Eighth Amendment intended the Excessive Fines Clause to include punitive damages in civil cases. The ban against excessive amercements in the Magna Carta was clearly understood as a limit on criminal punishments, not civil damages. The fact that punitive damages and criminal penalties both seek to punish and deter misconduct does not entitle civil defendants to the safeguards accorded a criminal accused. Civil and criminal proceedings are constitutionally distinct, and there is no basis for requiring plaintiffs in civil actions to comply with constitutional restrictions imposed on the prosecution in criminal cases.

ARGUMENT

I.

THIS COURT SHOULD NOT IMPOSE A FEDERAL CONSTITUTIONAL LIMIT ON PUNITIVE DAMAGES AWARDS IN STATE TORT ACTIONS

A. Appellant seeks to impose a substantive limit on jury verdicts for punitive damages under the Excessive Fines Clause.

It is important to describe precisely the nature of the relief that appellant seeks in this Court. Bankers Life acknowledges that the purpose of punitive damages is to punish and deter misconduct. Appellant does not argue that the judgment against it did not conform to the requirements of state law, nor that the manner in which punitive damages are awarded in Mississippi courts violates procedural due process.[1] Instead, appellant charges that the common-law rule that permits juries to make "subjective" assessments of punitive damages based on the specific misconduct and the wealth of the defendant leads to unpredictable and unduly high verdicts. App. Brief at 12-14. Appellant asserts that the criminal penalty set by the legislature for prosecutions of similar misconduct is the proper objective standard for determining the amount of punitive damages necessary to punish and deter. App. Brief at 35.

Bankers Life does not offer a concrete description of the rule it wishes this Court to impose on the states. A fair reading of appellant's brief is that the trial judge, and then the Mississippi Supreme Court, after reviewing the propriety of the punitive damage verdict under state law, should have determined that Bankers Life could have been fined no more than $1,000 in a criminal prosecution for its misconduct. App. Brief at 14.[2]

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1. Amicus does not address appellant's due process challenge to the retroactive application of a standard of conduct (App. Brief at 40-43) which is limited to the facts of this particular case.

2. Actually, Bankers Life submits that the objective standard of excessiveness should be the *relationship* of the punitive damage award to the monetary criminal penalty for the same or similar misconduct. App. Brief at 35. It is clear

What Bankers Life seeks, essentially, is a substantive cap on punitive damages. The liability insurance industry and other interest groups have proposed damage caps of various sorts as part of an intense lobbying effort for tort "reform" in the state legislatures. *See generally* Demarest and Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest*, 18 St. Mary's L.J. 787 (1987); "Both Sides Brace for Tort Battle," National Law Journal, Feb. 16, 1987, at 1. Such caps are generally characterized by a maximum set by the legislature on the amount a jury can award in a common law tort action.[3] The maximum is not based on the evidence before the jury in the particular action, but on extrinsic factors, generally the legislature's desire to protect a class of defendants from the effects of large verdicts. It is worth noting that in its 1986 legislative session, the Mississippi legislature defeated HB 307, which would have limited awards of noneconomic damages, including punitive damages, to $150,000. Bankers Life now offers a similar proposal to this Court in the guise of a constitutional imperative. Appellant would substitute the legislature's judgment as to the monetary amount needed to punish and deter in place of the factual findings of the jury. The only difference is that, instead of applying a cap that was designed by the legislature to limit punitive awards, the court would look to the fines set forth in the criminal code, which were never intended to serve this purpose. Even when imposed by a state legislature after due consideration of the policies involved, such damage caps are of dubious constitutionality.[4] For appellant to urge this Court to

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from appellant's desire for predictability and objective standards, and from the fact that appellant suggests no other factors that might affect the determination, that appellant would expect the reviewing court to treat the maximum criminal fine as the maximum punitive damage award.

3. Damage caps imposed on common-law causes of action should be distinguished from limitations of liability for statutory causes of action, which are well within the province of the legislature.

4. *See Smith* v. *Department of Insurance*, 507 So. 2d 1080 (Fla. 1987) (cap on noneconomic damages violates right of access to the courts); *Carson* v. *Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) (limit on noneconomic damages violates equal protection); *Arneson* v *Olson*, 270 N.W.2d 125 (N.D. 1978) (cap on liability of a physician for medical negligence unfairly discriminates against

impose a legislative limit on punitive damages in spite of the legislature's rejection of that notion shows precious little regard for the legislative judgment that appellant professes to prize so highly. App brief at 35.

The sole source of authority offered by appellant for this dramatic intrusion into state tort law is the Excessive Fines Clause of the Eighth Amendment. Amicus vigorously contests appellant's construction of "fines" in this provision to include punitive damage awards in civil suits. *See* Part II, *infra*. This Court need not reach that issue of constitutional construction, however. Even if appellant's novel reading of the Excessive Fines Clause were correct, its appeal must fail because the Excessive Fines Clause does not apply to the states.

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malpractice victims in violation of equal protection and due process provisions of the state and federal constitutions); *Boyd* v. *Bulala*, 647 F. Supp. 781 (W.D. Va. 1986)(cap on recovery under Virginia's medical malpractice statute violates the victim's right to a jury trial under the U.S. and Virginia Constitutions); *Waggoner* v. *Gibson*, 647 F.Supp. 1102 (N.D. Tex. 1986)(statute limiting medical malpractice recovery to $500,000 violates equal protection under the state and federal constitution and the open courts provision of the state constitution); *Baptist Hosp. of S.E. Texas* v. Baber, 672 S.W.2d 296 (Tex. App. 198-)(limit on damages in malpractice actions against hospitals violates equal protection); *Duren* v. *Suburban Community Hosp.*, 482 N.E.2d 1358 (Ohio C.P. 1985)(cap on general damages in medical malpractice actions violates equal protection guarantees of state and federal constitutions); *Simon* v. *St. Elizabeth Medical Center*, 3 Ohio Ops. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976)(cap on damages violates equal protection, due process and right to trial by jury); *Graley* v. *Satyatham*, 74 Ohio Ops. 2d 316, 343 N.E.2d 832 (Ohio Ct. C.P. 1976)(similar); *Wright* v. *Central DuPage Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (Ill. 1976)(cap on medical malpractice damages violates state constitutional ban against special legislation); *Jones* v. *State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. den. 431 U.S. 914 (1977)(cap on damages did not violate federal due process or state access to courts; but court remanded to determine whether statute violated prohibition against special legislation. On remand, damages limit held unconstitutional: No. 55527 & 55586 (4th Dist. Ct., Nov. 3, 1980). *Contra*, *Fein* v. *Permanente Med. Group*, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P.2d 665 (1985), app. dism., 106 S. Ct. 214 (1985)(upholding cap on noneconomic damages in medical malpractice cases); *Johnson* v. *St. Vincent Hosp.*, 404 N.E.2d 585 (Ind. 1980)(upholding cap in medical malpractice actions); cf. *Prendergast* v. *Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977)(plurality; only three of seven justices found $500,000 limit on damages constitutional).

B. The Excessive Fines Clause does not apply to the states

The first eight amendments to the U.S. Constitution are a limit on the power of the federal government. Although this Court has applied many of the specific guarantees in the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment, this Court has never incorporated the Excessive Fines Clause. *See* L. Tribe, American Constitutional Law 567-68 (1978)(collecting decisions).

The demand that the states comply with a federal constitutional provision is a matter that this Court has never taken lightly. This Court has recognized that the federal government is not the repository of all wisdom. "One of the happy incidents of our federal system," as Justice Brandeis pointed out, is that a state may serve as a "laboratory" in matters of economic and social regulation. *New State Ice Co.* v. *Liebman*, 285 U.S. 262, 280 (1931)(dissenting). The decisions to incorporate many Bill of Rights safeguards did not repudiate this fundamental notion. Rather they illustrate the corollary principle that where the states have shown themselves unwilling or unable to protect fundamental individual rights, this Court will impose federal constitutional safeguards.

Bankers Life does not address the issue of applicability of the Excessive Fines Clause to the states. Appellant's brief makes no effort to sustain the heavy burden of showing that its construction of that provision is not only proper under federal law, but is so fundamental to due process that state courts must also obey its command. For this reason, Amicus suggests that Bankers Life's appeal be dismissed for failure to raise a substantial federal question.

C. The Excessive Fines Clause is not essential to due process

This Court could, of course, address the issue of incorporation on its own. Amicus suggests that a review of the factors that this Court has considered in making this determination leads to the clear conclusion that the Excessive Fines Clause should not be applied to the states.

The precise issue, of course, does not focus on the Excessive Fines Clause in the abstract, but on the specific interpretation of the requirements of that provision. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). Amicus will therefore assume for the sake of this argument that the Excessive Fines Clause means what appellant says it means: Punitive damage awards must be proportional to monetary criminal penalties for the same or similar conduct. This Court's test for determining whether a particular constitutional rule should be incorporated into the Fourteenth Amendment is whether that rule is "necessary to an Anglo-American scheme of ordered liberty." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 n.14 (1968).

The factors that this Court considered in its decision to incorporate the Fourth Amendment exclusionary rule and other constitutional provisions provide a useful paradigm in analyzing the question presented here. In *Mapp* v. *Ohio*, 367 U.S. 1684 (1961), this Court applied the exclusionary rule to the states based on (1) the importance of the interest protected by the rule, 367 U.S. at 656, (2) the fact that the federal government and some states had already adopted the rule, 367 U.S. 659-60, and (3) the experience in the states in protecting the interest by other means, 367 U.S. at 651. In *Mapp*, this Court concluded that since the privacy interest protected by the proposed exclusionary rule was fundamentally important, since the rule had been recognized by the federal government and an increasing number of states, and since other means of protecting privacy had proved futile, the rule should be imposed on the states through the Fourteenth Amendment. These factors recur in other incorporation decisions following *Mapp*. Amicus submits that under this analysis, appellant's proposed application of the Excessive Fines Clause is clearly not an essential element of ordered liberty.

1. No court has adopted the Excessive Fines Clause as a limit on punitive damages.

Appellant is faced with the fact that the rule it seeks to replace is rooted in the tort law system of the great majority of states. The classic formulation of the rule is:

> Punitive damages may be awarded for conduct that in outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of defendant's act, the nature and extent of the harm to the plaintiff that defendant caused or intended to cause, and the wealth of the defendant.

Restatement (Second) of Torts § 908(2)(1977). No state has required that punitive damages be proportional to analogous criminal fines. As Justice Holmes has remarked, "if a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackson* v. *Rosenbaum*, 260 U.S. 22 (1922).

Furthermore, this Court has approved the awarding of punitive damages by the jury, at least implicitly, since *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), where this Court noted that jury awards of punitive damages were "a well-established principle of the common law." In *Smith* v. *Wade*, 461 U.S. 30 (1983), this Court, citing numerous common-law decisions recognizing punitive damages, held that a jury may award punitive damages, under a state standard of reckless indifference, in a federal civil rights action. This Court explained in *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981) that by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." As this Court pointed out in *Carlson* v. *Green*, 446 U.S. 14, 22 n.9 (1980), "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional

rights are maliciously violated but the victim cannot prove compensable injury." In *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court upheld a $10 million punitive damage award as not preempted by the Atomic Energy Act. The Court noted that punitive damages "have long been a part of traditional state tort law" which Congress intended to preserve to provide "adequate remedies for those who are injured by exposure to hazardous materials." 464 U.S. at 255 and 257. The Court rendered these decisions against the backdrop of the basic principle that "the Constitution presents no general bar to the assessment of punitive damages in a civil case." *Curtis Pub. Co.* v. *Butts*, 388 U.S. 139, 159 (1967).[5] It is highly unlikely that this Court should have repeatedly approved punitive damage recoveries that violated fundamental notions of ordered liberty. This Court may be fallible, but does not make it a routine practice.

2. The due process interest involved is not great.

Whether the states must apply a federal constitutional guarantee depends in large part on the nature of the interest at stake. Most of this court's decisions incorporating provisions of the Bill of Rights have protected the life or liberty of criminal defendants or First Amendment speech. This Court has pointed out that, while the parties in a civil suit may be intensely interested in the damages awarded, a defendant's property interest in "mere money" is far less significant in the due process equation. *Addington* v. *Texas*, 441 U.S. 418, 423-24 (1979), *Santosky* v. *Kramer*, 455 U.S. 745, 755-56 (1982).

Bankers Life attempts to bolster the significance of the interest at stake by claiming that punitive damages are wildly out of control. Critics of punitive damages have often resorted to alarmist rhetoric concerning the dire impact of skyrocketing punitive damage verdicts. *See* Daniels, Punitive Damages: Storm on the

5. The First Amendment presents a specific limitation on the use of punitive damages that may inhibit protected speech. *Gertz* v. *Robert Welch, Inc.* 418 U.S. 323 (1974). No First Amendment concerns are presented by the judgment against Bankers Life in this case.

Horizon? 1-3 (American Bar Foundation 1986) (collecting notable examples). But there has been almost no empirical information concerning the impact of such verdicts beyond "anecdotes, horror stories, and surveys of appellate opinions, all of which are guaranteed to produce a distorted (unintentionally, we may assume) picture of things." *Id.* at 5. One commentator, who is otherwise sympathetic to the insurance industry's pleas for "tort reform," admits that "there remains a noticeable lack of statistical data supporting the insurance industry's position regarding the allegedly devastating effects of increased size and frequency of punitive damage awards." Neal, *Punitive Damages: Suggested Reform for an Insurance Problem*, 18 St. Mary's L.J. 1019, 1021 (1987).[6] Recent studies examining awards in selected jurisdictions now reveal what trial lawyers have known all along: Juries do not award punitive damages routinely, and large punitive damage verdicts are quite rare. The most ambitious study, conducted by the Rand Corporation examining 24,000 jury verdicts in San Francisco and Chicago area courts from 1960 to 1984, found that "punitive damages were rarely awarded in personal injury litigation, and when awarded were usually small." M. Peterson, S. Sarma and M. Shanley, Punitive Damages: Empirical Findings vi (Rand Corp. 1987) ["Rand Study"]. The American Bar Association's Special Committee on Punitive Damages, utilizing the Rand data and a 10-state study by the American Bar Foundation, found that most of the increase in punitive damage awards occurred in business and contract cases (including insurance bad-

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6. Commentators more sympathetic to the interests of consumers and potential tort victims take a decidedly less sanguine approach to the purported "crisis" in tort litigation. The latest data reveals that the liability insurance industry has remained quite profitable and that the purported "crisis" has less to do with verdicts than with insurance company greed and mismanagement and the cyclical nature of the industry. See National Association of Attorneys General, An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance (May 1986); Nader, *The Corporate Drive to Restrict Their Victims' Rights*, 22 Gonzaga L. Rev. 15 (1986/87); Schroeter and Rutzick, *Being an Insurance Company Means Never Having to Say You're Sorry*, 22 Gonzaga L. Rev. 31 (1986/87); "The Manufactured Crisis: Liability-Insurance Companies Have Created a Crisis and Dumped It On You," 51 Consumer Reports 544 (Aug. 1986).

faith cases). Awards in personal injury cases, the target of most criticism, have remained relatively stable in frequency and amount during 1960 to 1984. Punitive Damages: A Constructive Examination 2-2 to 2-5 (American Bar Association 1986) ["ABA Report"]. An independent statistical survey of reported punitive damage decisions confirms that "such awards seem to be neither frequent nor crushing in any absolute sense." Landes and Posner, *New Light on Punitive Damages*, Regulation 33 (Sept./Oct. 1986) Amicus will not burden this Court with the considerable amount of statistical data underlying these conclusions and readily concedes that none of the studies purports to present a conclusive picture of punitive damage verdicts across the country. Amicus does submit, however, that the best existing evidence reveals no "crisis" that might conceivably warrant a federal constitutional limitation on punitive damage verdicts.

3. The states adequately protect the due process interests of defendants.

Another factor that this Court's has looked to is whether the states adequately protect the defendant's interest by other means. For example, this Court did not compel the states to apply the exclusionary rule under the Fourth Amendment until it was clear that alternative state methods of protecting privacy interests were ineffective. *Mapp* v. *Ohio*, 367 U.S. 643, 651-53 (1961). Conversely, this Court declined to extend the cruel and unusual punishment clause to school punishment, in part, because existing state common-law remedies were sufficient to protect the liberty interests of school children. *Ingraham* v. *Wright*, 430 U.S. 651, 677-79 (1977).

Appellant asserts that defendants may be subjected to excessive punitive damage awards because juries "impose crushing financial burdens for the most whimsical of reasons." App. Brief at 8. Amicus agrees that juries should be instructed concerning the specific factors which they may consider in assessing punitive damages. The courts can readily correct any deficiency in this area. *See, e.g., Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 295,

294 N.W.2d 437, 460 (1980) (listing seven specific factors that the jury must be instructed to consider). Imposing a constitutional limit on the maximum award does nothing to further this goal.

More importantly, appellant makes the mistake of looking at punitive damages in a vacuum. Trial and appellate judges bear the responsibility of reviewing punitive damage awards for excessiveness. In a leading decision, the Wisconsin Supreme Court stated that "judicial controls . . . will provide for fair administration of punitive damage awards in this state." *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 298, 294 N.W.2d 437, 457 (1980). Amicus submits that these controls adequately protect defendants against excessive punitive damage verdicts, rendering a federal constitutional limitation an unnecessary intrusion into state tort law.

Appellant's concern that punitive damages may be "employed to punish unpopular defendants," (App. Brief at 13) is misplaced. A jury may assess punitive damages only after finding the defendant liable for a recognized tort and guilty of willful or reckless misconduct. Even then, a trial judge or appellate court must reverse or reduce the award if it was based on passion or prejudice. 2 Ghiardi and Kircher, Punitive Damages Law and Practice § 18.07 (1985); *see, e.g., Burnett* v. *National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (remittitur of $1.3 million verdict to $150,000).

Appellant strenuously objects to the notion that juries base their assessment on the proper amount of damages on the wealth of the defendant. Appellant overlooks the fact that this principle protects the rights of defendants. The universally-accepted corollary of this principle is that: "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control* v. *Jenkins*, 409 So.2d 1039, 1043 (Fla. 1982). Courts routinely order remittiturs on the ground that punitive damage awards must not be allowed to bankrupt the defendant. *See In re "Dalkon Shield" Products Liability Litigation*, 526 F.

Supp. 887, 899 (N.D. Cal. 1981), *vac. other grnds.* 693 F.2d 847 (9th Cir. 1982), *cert. den.* 459 U.S. 1117 (1983); *Maxey* v. *Freightliner Corp.*, 450 F. Supp. 955, 960-61 (N.D. Tex. 1978), *rev'd other grnds.* 665 F.2d 1367 (5th Cir. 1982); *Morris* v. *Parke Davis, Inc.*, 573 F. Supp. 1324, 1327-28 (C.D. Cal. 1983); *Thiry* v. *Johns Manville Corp.*, 661 P.2d 515, 518 (Okla. 1985); *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). It is more likely that large compensatory awards, which are not assessed in relation to defendant's ability to pay, could bankrupt a defendant.

These standards of review do not merely exist on paper. Courts are becoming increasingly stringent in reviewing punitive awards. "[T]here appears to be a growing trend to subject such awards to greater judicial scrutiny." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 44 (1982). A study of the subsequent history of punitive damage verdicts found that 50% of jury verdicts were reduced by remittitur or settlement. For the largest awards, the number was 80%. ABA Report, *supra*, at 2-5. *See also* Rand Study, *supra*, at 30. As one court notes, "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The spectre of bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co.* v. *Day*, 594 P.2d 38, 48 (Alaska 1979).

It is Amicus' position that the common-law rules governing punitive damages represent the most effective way for states to further the goals of tort law in protecting citizens from socially undesirable conduct in a manner that is not arbitrary or unfair to defendants. If a different balance should be struck more favorable to the interests of defendants, it is for the states to strike it. Several state courts, for example, have required plaintiffs to prove misconduct by clear and convincing evidence. *Tuttle* v. *Raymond*, 494 A.2d 1353 (Me. 1985); *Travelers Indem. Co.* v. *Armstrong*, 442 N.E.2d 349 (Ind. 1982); *Wangen* v. *Ford Motor Co.*, 97 Wis.2d 260, 298, 294 N.W.2d 437, 457 (1980).

Of particular significance is the fact that state legislatures have been actively addressing the concerns raised by defendants. In 1986 alone, nine states enacted modifications of laws relating to punitive damages, including raising the quantum of proof required of plaintiffs, setting a ratio between the punitive award and compensatory damages, and providing that a portion of awards be paid to public funds. See ABA Report, *supra*, at 1-5 (collecting statutes).

It is clear that the states are performing their function as laboratories and that they are fully protecting the interests of defendants against liability for excessive punitive damage awards. Imposition of a federal constitutional mandate is unwarranted.

4. The proposed application of the Excessive Fines Clause is in apparent violation of the right to trial by jury.

As amicus previously noted, the limitation on punitive damages that Bankers Life seeks to impose under the Excessive Fines Clause is essentially a cap on damages. It substitutes the judgment of the legislature for that of the jury in a civil action. Amicus contends that such a limitation violates the plaintiff's right to trial by jury under the Seventh Amendment and/or substantially similar guarantees under the state constitutions. The Seventh Amendment provides:

> In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend VII.

A federal district court presented with this precise issue found that a Virginia statute which imposed a monetary limit on medical malpractice damages was unconstitutional. *Boyd* v. *Bulala*, 647 F. Supp. 781 (W.D. Va. 1986). The court's analysis is a focused and principled application of the right to trial by jury which is worth examining in some detail:

"The federal right to a civil jury trial is limited to those actions in which the right to jury trial existed at common law and actions where Congress specifically provides for a jury by statute. *Ex Parte Peterson*, 253 U.S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1919). In such actions the seventh amendment prohibits interference with the ultimate determination of issues of fact by the jury. *Id.* at 310, 40 S. Ct. 546. Specifically, the amendment provides the right to have a jury properly determine not only the question of liability but also the extent of damages. *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 269, 301, 79 L. Ed.2d 603 (1935)." The Virginia damage cap "infringes strongly on the fact-finding function of the jury in assessing appropriate damages. Since the assessment of damages is a fact issue committed to the jury for resolution, a limitation on the performance of that function is a limitation on the role of the jury. Since the right to a jury is guaranteed under the seventh amendment, it therefore follows that such a limitation is unconstitutional under the provisions of that amendment." The court further explained that the statute "would require the court to ignore a verdict in an amount above the cap which is supported by the evidence and instead enter judgment for the cap amount. This extraordinary requirement bears no relation to the doctrines of remittitur, new trial, and judgment notwithstanding the verdict, and it cannot be founded upon the court's inherent power over verdicts and judgments. Indeed, there exists no permissible basis for entering a judgment predetermined by the legislature in place of a judgment on a verdict properly reached by a jury." The court concluded: "The legislature may not mandate the amount of judgment to be entered in a trial."

647 F. Supp. at 788-90.

In *Smith* v. *Dept of Insurance*, 507 So.2d 1080 (Fla. 1987) the Florida Supreme Court also found that a cap on noneconomic damages violated the state guarantee of access to the courts. "Nor, we add, because the jury verdict is being capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right." Slip op. at 12.

The Seventh Amendment right to a civil jury trial has not been incorporated into the Fourteenth Amendment and so does not govern this case. What amicus suggests, however, is that a cap on damages which substitutes legislative standards for the findings of a jury in a common law action is so clearly violative of the right to a jury trial in the federal and state constitutions, along with the state constitutional right of access to the courts, that such a limitation cannot possibly be deemed essential to Anglo-American scheme of justice.

D. Imposition of limits on the amount of punitive damage awards would seriously undermine important state interests.

1. Jury assessments of punitive damages serve important social policies underlying tort law.

Tort law, generally speaking, is state law. Bankers Life mistakenly characterizes tort law as merely a system for compensating injured victims. The states bear the responsibility of delineating the duties and standards of conduct that citizens may reasonably expect to render and receive. An aggrieved plaintiff must not only establish causation, but also a breach of duty. In this manner, compensatory damages also serve to punish and deter undesirable conduct. These duties do not remain static, but evolve to reflect the social values, economic conditions, and technological advances of the time.

Compensatory damages alone are not always adequate to serve these policies. Recent developments in the law of torts have focused on protecting the rights of consumers against corporate entities that enjoy vastly superior bargaining power in the marketplace. Products liability and insurance bad-faith actions are primary examples of this evolution. Punitive damages play an important role in securing the policies that led the states to adopt these causes of action.

Products liability law, for example, is concerned not only with compensating injured victims of defective products, but also with keeping unreasonably dangerous products off the market in the

first place. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973). The problem is that "the principles of strict liability are ill-equipped to deal with problems at the other end of the culpability scale where an injury results when a manufacturer markets its products in an intentional or reckless disregard for consumer safety. Nor has the criminal law filled this void. A legal tool is needed that will help to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare. The punitive damages remedy is such a tool." Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1259-60 (1976). An excellent example is provided by the Pinto experience. Ford Motor Company had explicitly anticipated that 180 people would die and 180 others would be seriously burned each year due to the vulnerability of the Pinto's fuel system to rear-end impact. After estimating the amount of compensatory damages Ford might be expected to pay, the company found it was cheaper to pay the compensatory damages than to invest about $11 per car to make the fuel system safer. *See Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 800, 174 Cal. Rptr. 348, 376 (1981). The predictability of compensatory liability permits an unscrupulous manufacturer to simply internalize such awards as a cost of doing business. By deciding not to invest in safety, such a manufacturer can achieve a price advantage over more safety-conscious competitors. It is estimated, for example, that Ford saved some $200 million by delaying fuel-system safety and using its influence to postpone federal regulations. *Ford Motor Co.* v. *Durrill*, 714 S.W.2d 329 (Tex. App. 1986). A rule that makes punitive damages similarly predictable would seriously undermine the social goals that led the courts to adopt strict liability in the first place.

Similarly, the fairly recent adoption of the tort of bad-faith denial of insurance claims recognizes that an unscrupulous insurer whose liability is limited to compensatory damages has a financial incentive to improperly deny claims with the expectation

that most insureds will not sue and that the profits will offset compensatory liability. Indeed, the Mississippi Supreme Court indicates that this is precisely the course that Bankers Life was following in this instance. *See Bankers Life & Cas. Co.* v. *Crenshaw*, 483 So.2d 254, 271 (Miss. 1985) Punitive damages has been shown to deter such outrageous misconduct toward the consumer. *See* Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979). As the Mississippi court concluded in this case, "Conduct of an insurance company not authorized by law which carries with it a potentiality of great harm to the insurance public is an outrage, and should be condemned. Punitive damages in such a case is an appropriate, and perhaps the only remedy. In this kind of case, it is the medicine most likely to cure the malady." *Bankers Life & Cas. Co.* v. *Crenshaw*, 483 So. 2d 254, 276 (Miss. 1985).

The fact that a wrongdoer cannot predict his potential exposure to punitive damages before embarking on willful or reckless misconduct is not a vice, but a virtue that serves the purposes of the substantive law of torts. If such a remedy did not exist, tort law would have to invent it. This Court should not undermine the important objectives of tort law by neutralizing an important tool available to the states.

2. Punitive damages further the state's interest in enforcing its criminal law.

The fact that punitive damages seek to punish and deter misconduct does not set them in conflict with the criminal law. Punitive damages offer an effective supplement to criminal law enforcement. Mallor and Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 657-58 (1980). Criminal sanctions are often too low to represent an adequate deterrence to corporate wrongdoers. In *Grimshaw*, *supra*, the California Court of Appeal rejected Ford's complaint that the

punitive damage award was disproportionate to penalties for violation of the Vehicle Code. The court pointed out that the maximum penalties under the state code provisions were $50 and $100. The court's answer is directly responsive to appellant's contentions here:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

119 Cal. App.3d at 810, 174 Cal. Rptr. at 389.

Moreover, the likelihood of criminal punishment for many types of corporate misconduct is slim indeed. The states do not possess the resources for enforcing criminal sanctions against all such misconduct. The Pinto experience again provides an excellent object lesson. After three women died in a fiery crash, an Indiana prosecutor brought homicide charges against the company. The maximum penalty faced by Ford was $10,000 for each death. Ford spent an estimated $1 million to defend the case; the prosecution spent $40,000, twice its entire annual budget. Ford was acquitted. *See* "How Ford Won Pinto Trial," *National Law Journal*, Mar. 24, 1980, at 1. The states must be able to rely on private tort actions to supplement its law enforcement efforts. This Court similarly recognized that the treble damage remedy for antitrust violations is a significant supplement to the limited resources of the Justice Department. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979).

Appellant's proposal to set a federal limitation on the amount of punitive damages does not simply reduce a "windfall" to private plaintiffs. It severely undermines the public policy objective

of the states. Principles of federalism should lead this Court to reject such an intrusion on the interests of the states.

E. A federal constitutional limit on damages would impose a severe burden on this Court.

Bankers Life presents its proposed rule in deceptively simple terms: Merely look to the criminal fine for the same conduct and strike the excess. In fact, there is no precise correlation between torts and crimes. Some tortious misconduct may not be criminal at all; other wrongs may fit within a variety of criminal offenses. Bankers Life itself suggests some difficulty in determining the proper criminal provision applicable to its conduct in this case. App. Brief at 35 n.18. Should a drunk driver who kills a pedestrian be subject to punitive damages up to the maximum fine for driving while intoxicated, or that for negligent homicide? By asking this Court to impose a federal constitutional standard that is utterly lacking in precedent, appellant presumes that this Court is willing and able to undertake the burden of creating and construing an entirely new federal law of punitive damages. Further, as this Court recognized in *Solem* v. *Helm*, 463 U.S. 277, 290 n.17 (1983), the proportionality analysis is inherently fact-bound. Appellant proposes that this Court entertain federal question appeals on a continuing basis from punitive damage verdicts around the country.

Amicus suggests that the interest of Bankers Life in placing a federal limit on the amount of punitive damages it may be required to pay for its misconduct does not justify the substantial increase in this Court's workload.

II.
THE EXCESSIVE FINES CLAUSE DOES NOT APPLY TO PUNITIVE DAMAGE AWARDS IN CIVIL CASES

If this Court determines that the Excessive Fines Clause applies to the states, the Court faces the issue that was assumed in Part I: Does the Excessive Fines Clause apply to punitive damage

awards? Amicus submits that the Eighth Amendment's protection against excessive fines is a limit on the power of the government to punish crimes. It extends only to the punishment imposed on one convicted of a crime by a court exercising its criminal jurisdictional power. It does not apply to damage awards of any kind in private civil suits.

A. The Eighth Amendment does not apply to civil damages.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. An early decision by this Court held that the Excessive Fines clause is addressed to federal courts in the exercise of their criminal jurisdiction. *Ex Parte* Watkins, 32 U.S. 568 (1833).

In *Ingraham* v. *Wright*, 430 U.S. 651 (1977), where this Court declined to extend the guarantee against cruel and unusual punishment to corporal punishment in the schools, the Court clearly defined the boundaries of the Eighth Amendment.

> Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations, the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.

430 U.S. at 664. This Court reaffirmed its view that the plain meaning of the text of the Eight Amendment imposed parallel limitations on criminal punishments in *Solem* v. *Helm*, 463 U.S. 277, 289 (1983).

Appellant places a great deal of emphasis on dicta in *Ingraham* that some punishments not labelled criminal by the state may be sufficiently analogous to justify application of the Eighth Amendment. 430 U.S. at 669 n.37. The Court referred to actions for involuntary commitment in mental or juvenile institutions.

These are governmental deprivations of personal liberty authorized by statute. Nothing in the Court's footnote provides any support for the notion that an element of damages in a lawsuit based on a common-law cause of action could ever be subject to the Eighth Amendment.

Bankers Life also relies on the absence of any express language limiting the Eighth Amendment to criminal cases. App. Brief at 18. Appellant acknowledges that the English Bill of Rights of 1689 is an important source in determining the meaning of the Eight Amendment. App. Brief at 20-21. Bankers Life ignores this Court's explanation that although original draft of the English Bill of Rights expressly limited to criminal cases, and reference to "criminal cases" was eliminated from the final draft, "the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance." *Ingraham* v. *Wright*, 430 U.S. at 665.

B. The Framers of the Constitution did not intend the Excessive Fines Clause as a limitation on civil damage awards.

Despite this Court's clear ruling that the Eighth Amendment extends only to criminal cases, Bankers Life argues that the Framers intended the Excessive Fines Clause to limit any monetary penalty, civil or criminal, imposed for the purpose of punishment and deterrence. Bankers Life acknowledges that the evidence of the intent of the Framers is "scant." Appellant therefore harkens back to the mists of Runnymede and Chapter 20 of the Magna Carta. That chapter reads:

> A freemar shall not be amerced for a small offence, except in accordance with the degree of the offence; and for grave offence he shall be amerced in accordance with the gravity of his offence . . .

Appellant argues that "modern-day punitive damage awards are virtually indistinguishable from amercements in theory and in practice and therefore would have been regarded by the Framers and the colonists as being controlled in their size by the Excessive

Fines Clause." App. Brief at 24. This statement reveals an ignorance of history of considerable depth. Appellant ignores this Court's gently understated reminder that the distinction between civil and criminal "is of some constitutional import." *United States* v. *Ward*, 448 U.S. 242, 249 (1980). The distinction is fundamental. Civil lawsuits are essentially disputes between private parties for which the state provides an arena but which do not implicate the power of the state. Criminal prosecutions represent the ultimate exercise of the sovereign's power over the individual. The barons who confronted King John in 1215 were not a committee seeking tort reform; They sought to confine the sovereign power of the king.

Amercements were, essentially, criminal fines. They were "a pecuniary mulct laid upon an individual who had offended the king." T. Taswell-Langmead, English Constitutional History 92 (1905). The distinction between grave offenses and small offenses reflected the distinction between felonies and misdemeanor crimes. 2 J. Stephen, History of the Criminal Law of England 198 (1883). These misdemeanors included misconduct by parties in connection with judicial actions, such as false swearing and failure to prosecute a claim. *Id.* The amounts were payable to the king.

As this Court explained in *Solem* v. *Helm*, 463 U.S. 277 (1983) "An amercement was similar to the modern day fine. It was the most common criminal sanction in 13th-Century England. See 2 F. Pollock and F. Maitland, The History of English Law 513-515 (2d ed. 1909)." 463 U.S. at 284 n.8. The amercements chapters of the Magna Carta were limitations solely on the criminal power of the king.

Appellant's assertion that the amercements chapters were applied to civil as well as criminal penalties is plainly wrong. Appellant's sole support for that assertion is a misquoted sentence from Blackstone:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of Magna Carta, concerning amercements for misbehavior *of the suitors* in matters of civil right. (Emphasis added)

4 W. Blackstone, Commentaries on the Laws of England *379 (miscited as *372 at App. Brief 27). In quoting this sentence at page 27 of its brief, Bankers Life omitted the words "of the suitors," a crucial phrase which reveals that Blackstone was referring to those misdemeanors such as false swearing or failure to prosecute, not to torts against the opposing party. The examples cited from Blackstone in which private litigants would have been required to pay a fine to the king as well as compensation to the plaintiff, App. Brief at 27, merely reflect the fact that until 1694, the criminal and civil jurisdictions were not separated. W. Prosser, Torts 8 (4th ed. 1971). This Court has had occasion to interpret the same passage and came to opposite conclusion from appellant's. "Thus, Blackstone treated each of the provision's three prohibitions as bearing only on criminal proceedings and judgments. 4 Blackstone's Commentaries *297 (bail) *379 (fines and other punishments)." *Ingraham* v. *Wright*, 430 U.S. 651, 665 (1977).

It is clear that the Framers of the Excessive Fines Clause would have viewed the Magna Carta's provisions relating to amercements as applicable only to fines imposed by the state upon an individual convicted of a crime.

To the extent that the Framers gave any thought to punitive damage awards in tort actions, it is likely that they would have viewed such awards as essentially compensatory. As Bankers Life recognizes [App. Brief at 29], the English decisions that first set forth the notion of punitive damages rationalized them as compensatory. See also K. Redden, Punitive Damages § 2.2 (1980). As appellant admits, the notions of punishment and deterrence did not become the dominant justification for punitive damages until well into the 19th Century. App. Brief at 30. There is no basis for appellant's assumption that the drafters implicitly included punitive damage awards in their use of the word "fine."

C. Punitive Damages are not constitutionally equivalent to criminal fines.

Bankers Life and amicus Alliance of American Insurers, argue that since punitive damages serve the same function as criminal fines, they should be subject to the same safeguards. From the point of view of the corporate defendant and the impact of the penalty on corporate conduct, this may be true. It is a policy consideration that may be considered by a legislature in modifying common law remedies. The issue before this Court, however, concerns the constitutional boundaries of the power of the courts. In that analysis, the distinction between civil and criminal penalties is fundamental.

The reliance by amici on *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963) is clearly misplaced. The Court set out a test for making the sometimes elusive determination of whether a statutory action brought by the government seeks a criminal or civil, i.e. regulatory, penalty. A perceptive rebuttal to this argument is made in Note, *In Defense of Punitive Damages*, 55 N.Y.U.L. Rev. 303, 331-37 (1980). *Kennedy* is not concerned with the elements of damages in common-law actions. In the rare instance in which this Court found it necessary to make such a distinction, the Court has squarely held that punitive damages are civil. *Huntington* v. *Atrill*, 146 U.S. 657 (1892) (holding that, for purposes of the rule that a state will not enforce foreign criminal judgments, punitive damage judgments are civil) *See Holbein* v. *Rigot*, 245 So.2d 57 (Fla. 1971).

A court may impose a criminal penalty only in a proceeding brought by the state properly invoking the criminal jurisdiction of the court. A claim for punitive damages is not a separate cause of action. It is merely an element of damages that a plaintiff can recover after establishing defendant's liability for a recognized tort. A court simply has no power to impose a criminal penalty in a civil action. *Palmer* v. *A.H. Robins Co.*, 684 P.2d 187, 214 (Colo. 1984).

Moreover, the interests at stake in a criminal action are fundamentally different. The criminal defendant faces the investigatory and prosecutorial resources of the state. He is often indigent and represented by appointed counsel. The parties in a civil suit may be deemed to be on equal footing. Often, as in this case, the defendant is possessed of considerable financial and legal resources. There is no basis for requiring the injured plaintiff to meet the constitutional standards imposed on the prosecution in criminal cases.

CONCLUSION

To avoid paying the judgment rendered against it by the Mississippi court, Bankers Life is willing to unravel a great deal of constitutional law. Appellant's novel proposal violates notions of federalism and blurs the constitutional distinction between civil and criminal law. It has no support in history, precedent, or policy. Amicus submits that this Court should dismiss this appeal or affirm the judgment of the Mississippi Supreme Court.

Respectfully submitted,

.....

JEFFREY ROBERT WHITE
Counsel of Record
1050 31st St., N.W.
Washington, D.C. 20007
(202) 965-3500
Attorney for Amicus Curiae

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY
Appellant

v.

LLOYD M. CRENSHAW
Appellee

On Appeal from the Supreme Court
of Mississippi

BRIEF OF AMICI CURIAE CONSUMERS UNION OF U.S., CONSUMER FEDERATION OF AMERICA AND NATIONAL CONSUMERS LEAGUE IN SUPPORT OF APPELLEE

Andrew F. Popper
Counsel of Record
The American University
Washington College of Law
Washington, DC 20016
(202) 885-2645

July, 1987

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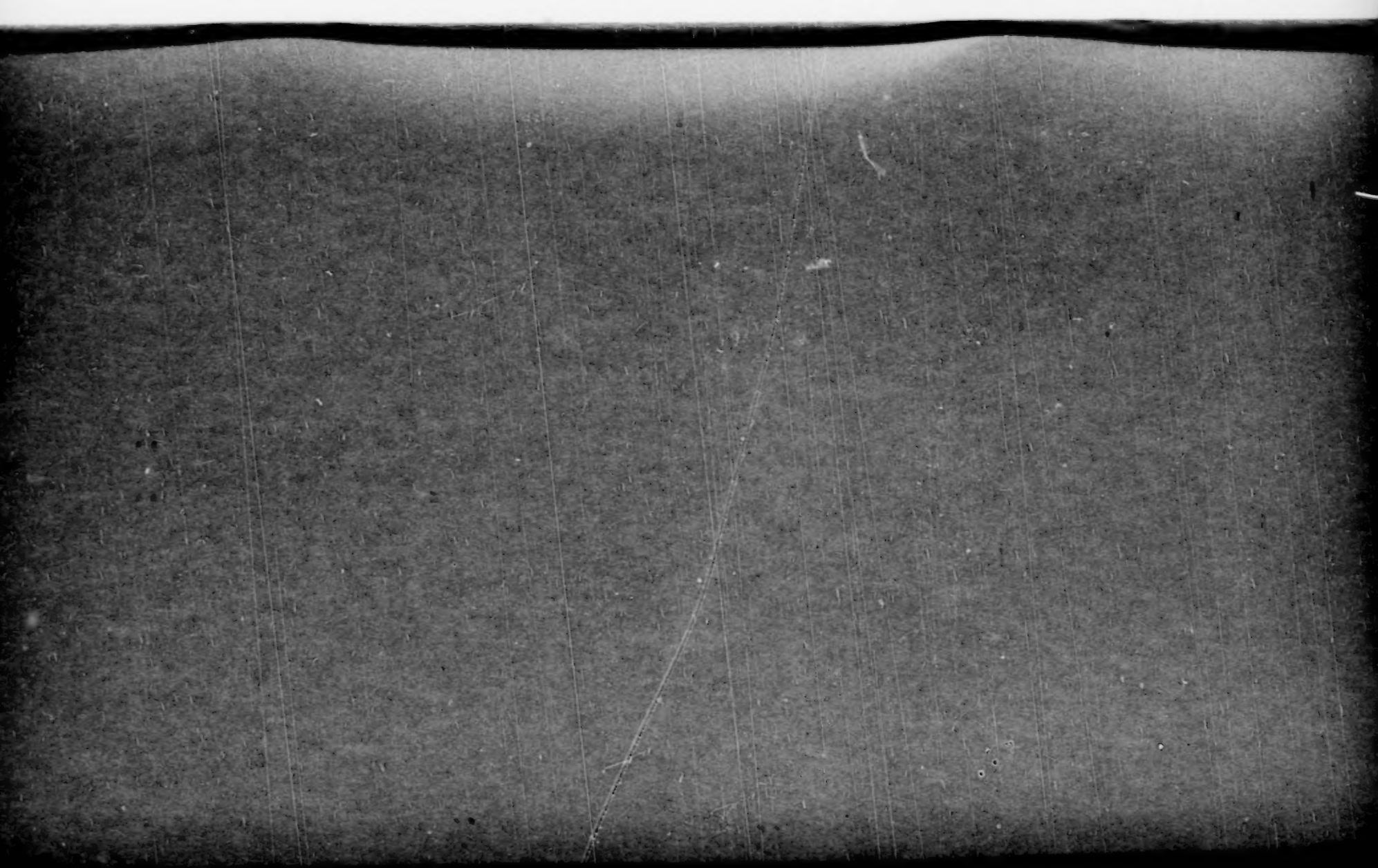


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No. 85-1765

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY
Appellant

v.

LLOYD M. CRENSHAW
Appellee

On Appeal from the Supreme Court
of Mississippi

BRIEF OF AMICI CURIAE CONSUMERS UNION OF U.S., CONSUMER FEDERATION OF AMERICA AND NATIONAL CONSUMERS LEAGUE IN SUPPORT OF APPELLEE

STATEMENT OF CONSENT

The Consumers Union of United States, Inc., the Consumer Federation of America, and the National Consumers League have obtained consent from all parties to this case to submit this brief, and they have filed the consent letters with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

Consumers Union is a non-profit membership organization founded in 1936. It engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government.

Consumer Federation of America is a coalition of over 200 national, state, and local consumer, senior citizen, labor, farm, cooperative, and rural organizations representing more than 30 million people in matters pertaining to the well-being of the American consumer.

The National Consumers League has

worked for safety and fairness of consumers and workers since 1899. The League seeks to insure that consumer and worker protections are enforced and updated by supporting necessary legal action.

The Consumers Union, Consumer Federation of America, and the National Consumers League are deeply concerned about insurance practices and the role punitive damages play in assuring a responsive and consumer-oriented insurance industry. Members of each organization have insurance similar to the appellee. It is in the interest of the members of each organization to maintain a strong tort system including a mechanism that permits punitive damages in appropriate circumstances. Without such a system, the members of these organizations will be denied an essential private sector ordering mechanism, resulting in the potential for increased insurance rates, poor customer

service, and an economic incentive to reject legitimate claims. Maintenance of the Mississippi tort system, including punitive damages, serves the interests of Consumers Union, the Consumer Federation of America, and the National Consumers League.

SUMMARY OF ARGUMENT

This case concerns the propriety of punitive damages under Mississippi tort law. It is contended that punitive damages awarded under that system violate the Eighth Amendment prohibition against excessive fines.

The Eighth Amendment derives from the English Bill of Rights, and the English Bill of Rights articulates certain values found in the Magna Carta. Neither the Magna Carta, the English Bill of Rights, nor the Eighth Amendment impose any constraints on private tort law judgments. All three documents address the rela-

tionship between the executive and the citizenry.

The English Bill of Rights and the Eighth Amendment prohibit the executive branch from imposing harsh or excessive sanctions in criminal cases. The relevant provision of the Magna Carta permits the King to collect amercements (fines or specialized taxes) only if a jury of peers determines the amount to be amerced. Amercements were to be proportional to the harm done to the King and bore no relationship to the embryonic civil tort system.

The conclusion that a civil damage proportionality requirement can be generalized from these historic documents is counter to history. All Commonwealth countries apply these documents to their legal systems, and all have punitive damages without any reference to this view of history.

The Eighth Amendment applies to criminal sanctions. It can be applied to civil fines imposed by the legislature if the purpose and effect of those fines parallels precisely the criminal law in all respects. Punitive damages are civil; to apply the Eighth Amendment it must be established that they are for all purposes a criminal sanction. That conclusion contravenes 200 years of caselaw, ignores findings by this Court declaring punitive damages to be part of traditional state law, ignores the fact that punitives are not legislative in origin, and ignores the full range of purposes underlying punitive damages.

If this Court decides to review punitive damages on the merits, the Mississippi system will survive scrutiny. Punitive damage awards made by properly instructed juries and subject to remittitur and appellate review comport with

due process. A fixed ratio between punitive damages and compensatory damages is arbitrary and unfair. Punitive damages punish gross misconduct, deter future misconduct, and serve other functions central to the civil tort system. To preserve the constitutional and beneficial system of punitive damages, the decision of the Mississippi Supreme Court should be affirmed.

ARGUMENT

I

NEITHER BRITISH HISTORY NOR PRECEDENT SUPPORTS THE PROPOSITION THAT THE AMERCEMENTS CLAUSE IN THE MAGNA CARTA HAD THE PURPOSE OR EFFECT OF LIMITING CIVIL DAMAGES

A. The Magna Carta Did Not Articulate Requirements Applicable to Disputes Between Private Parties.

The appellants contend that the proportionality requirement in the Amercements Clause of the Magna Carta (Chapter 20) establishes a fundamental axiom applicable to modern civil punitive damage verdicts. This premise is highly ques-

tionable, based on a review of the history at the time of the Magna Carta, the English Bill of Rights, the Eighth Amendment, and modern caselaw.

There is little question that amercements were fines payable to the King. They were not payable to private parties. Amercements coexisted with civil damages. "The distinction between amercements and damages is well known. The former were payable to the Crown after legal action or for an error or ineptitude which took place in its course; the latter represented the loss incurred by a litigant through an unlawful act. They were payable to [the private litigant]. . . ." 62 Selden Society, Introduction to the Curia Regis Rolls, 1199-1230 A.D. 463 (C.T. Flower ed. 1944) [hereinafter C.T. Flower].

Sums payable through amercements were not remedies to settle disputes between

private plaintiffs and private defendants. Private disputes that resulted in civil damages, particularly pertaining to disseisin, were somewhat unusual in the thirteenth century, though there are numerous recorded cases. C.T. Flower, supra, at 473-479. When parties were aggrieved by serious misconduct, a punitive judgment could be imposed: "And so in a characteristically English fashion punishment was to be inflicted in the course of civil actions: it took the form of manyfold reparation, of penal and exemplary damages." 2 F. Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I [1239-1307] 522 (2nd ed. 1911) (emphasis added). Similarly, civil damages could reflect a "moral" judgment pertaining to misconduct. C.T. Flower, supra, at 475. A separate system of civil justice that emerged later through the dominant writ of trespass and

that was designed to provide money damages to aggrieved parties was in its embryonic stage in the thirteenth century. Pollock & Maitland, supra, at 523.

Many civil actions concluded with separate awards for civil damages to be paid to the private litigant and an amercement or court fee to be paid to the justice or court. C.T. Flower, supra, at 465 et seq.; A. Harding, A Social History of English Law 61 (1966). The sums payable for amercements were guided by Chapter 20 of the Magna Carta; in contrast, civil damages paid to the private litigant "were much less standardised." C.T. Flower, supra, at 473. Civil damages in these earliest of tort actions "vary widely; and then, as now, their assessment must have been difficult." C.T. Flower, supra, at 476.

Chapter 20 of the Magna Carta placed limits on the amercement or fining power

of the King. Among other things, the clause requires proportionality and dictates that "the amercement should be in proportion to the wrong done; . . . this meant the wrong done to the lord or the court, and not to the other party to litigation in that court." 80 Selden Society, Novae Narrationes cci (S.E. Shanks ed. 1963) (emphasis added).[1] Thus, the executive abuse inherent in amercements related to extortive practices by the King. Such control was accomplished through the proportionality requirement and by assuring that a jury rendered a

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[1]This concept is central to the case before the Court. It underscores the proper meaning of amercements or fees payable to the King. The source, Selden Society, Novae Narrationes, supra, at cci, indicates this interpretation derives from Natura Brevium and Fitzherbert, Grand Abridgement of the Laws of England (1514). These sources are based on original case material from Bracton's authoritative work on the thirteenth century. "[I]t is ultimately to Bracton and to Bracton alone that we must look for an account of this period [1216-1272]. . . ." 2 W. Holdsworth, A History of English Law 286-88 (1923).

determination on the amount of an amercement, as opposed to a judge of the court of the King. The sole function of the court was to declare that an amercement or fine was due, at which point it became the obligation of the jury to fix the amount. W. Walsh, A History of Anglo-American Law 309 (1932); 4 W. Blackstone, Commentaries *372-3.

The desire to control executive excesses was borne of the fact that the amercement "system" involved fines and taxes imposed by the executive for the purpose of generating revenue. Amercements could be imposed on an individual, or used as a tax generally, "laid upon the County, Hundred, or Wapentake as a whole. . . ." 2 Vinogradoff, Oxford Studies in Social and Legal History, Customary Rents 186 (1974). A great concern underlying the Magna Carta was that the Kings' bench could amerce an entire community. 2 F.

Pollock & F.W. Maitland, The History of English Law Before the Time of Edward I 493 (2nd ed. 1923). "[T]he fines and amercements were another branch of the King's revenue. . . ." The Oxford English Dictionary, Vol. I, 279 (1971). The relationship to be confined, therefore, was between the King and the various communities, not, as the appellants' argument implies, between two private persons involved in a legal dispute.

The barons who pressed the Magna Carta on the King did so because "he had been violating the law in his conduct towards them . . . [and] they had learned that they could not trust him. . . ." G. Adams & R. Schuyler, Constitutional History of England 128 (1935). The concern was that the King and his courts through the force of office would be able to implement a public law system, and particularly a taxation system, that could

cripple the baronage. It was that sentiment that led to the adoption of Chapter 20 regarding amercements, and 473 years later led to the adoption of an excessive fines clause in the English Bill of Rights that was again designed to control the executive excesses of the King. 6 W. Holdsworth, A History of English Law 232 (1924).

B. The Magna Carta Was a Public Law Document.

It is contrary to history to assert that the Magna Carta was designed to have an impact on the damage awards payable to private persons. The "Magna Carta was an instrument of public law; little place will be found in it for private law principles." Lobingier, The Laws of England in the Thirteenth Century With a New Interpretation of the Barons' Reply at Merton 4 (n.d.). William Holdsworth warned legal historians against such overextrapolation of the meaning of the

Magna Carta: "Like all documents which have attained not merely fame but sanctity, it has become the source of dogmas and doctrines of which its framers never dreamt; and an attempt to ascertain the meaning which the men of 1215 attached to some of its more famous clauses, no doubt would, if it were a theological document, be denounced as blasphemous." 2 W. Holdsworth, A History of English Law 209 (1923).

This is not to suggest that the Magna Carta was inapplicable to private persons, but rather to suggest that it was applicable to transactions between private persons and the King. Similarly, it is not suggested that excessive amercements were not a problem; indeed they were. Amercements were assessed as taxes for a series of real or imagined transgressions of the King's interests. These included "false verdicts, the variation of pleas or

verdicts, contempt of court and some minor offenses, which can be brought together as breaches of etiquette." C.T. Flower, supra, at 469. In many cases, both plaintiff and defendant were amerced, highlighting the inapplicability of the amercements clause restraints to private civil actions. C. Kinnane, A First Book on Anglo-American Law 272 (2nd ed. 1952). The simple fact is that the Magna Carta did not address relations between and among private persons. For example, as to the nonperformance of contract or unlawful debt, "the Charter laid down nothing." And as to most other matters, the Charter "only touched the fringes. . . ." J.C. Holt, Magna Carta 232 (1965).

From all this, several things are clear. First, a control on amercements was a control on executive authority, not a dictate regarding private damages. Second, the drafters of the Magna Carta

had tremendous faith in the jury and directed that juries determine amounts for amercements and damages, recognizing full well the lack of certainty in that process. Third, the Magna Carta did not apply to damages paid to private persons but applied exclusively to the activities of the King. It is no accident of history that the Magna Carta was written by barons who sought to control executive authority, that the English Bill of Rights was written by those who sought to control the "perversions of judicial prerogatives of the Crown" by creating prohibitions on "excessive fines," 6 W. Holdsworth, A History of English Law 232 (1924), and that the Bill of Rights of the United States Constitution was written to address the concerns of antifederalists who feared the excesses of an overreaching and intrusive federal government. In sum, the historical antecedents leading to the English

Bill of Rights and the Eighth Amendment excessive fines clause suggest exclusively a desire to control executive authority and in no way suggest a desire to control the ability of an individual state to implement a punitive damage system in cases between private persons.

C. The Law Pertaining to Punitive Damages in Commonwealth Countries Is Not Constrained by the Magna Carta.

In the last century, the policies underlying punitive damages have been debated openly in Great Britain. Neither the Magna Carta nor the English Bill of Rights has played a role in this analysis.

In Great Britain, exemplary damages "are awarded to teach the defendant that 'tort does not pay' and to deter him and others from similar conduct in the future." Clerk & Lindsell, The Law of Torts 242-43 (15th ed. 1982). Punitive damages are provided "to punish the defendant in an exemplary manner, and

vindicate the distinction between a willful and innocent wrongdoer." 2 J. Saunders, Words and Phrases Legally Defined 5 (1969).

In Rookes v. Barnard, [1964] A.C. 1129, [1964] I All E.R. 367, the House of Lords placed limits on punitive damages by confining the categories in which punitive damages may be awarded. Rookes permits punitive damages where there has been arbitrary or abusive behavior by a government servant, where a defendant has profited substantially by engaging in misconduct, or where a statute authorizes punitive damages. Rookes v. Barnard, supra, [1964] A.C. at 1226-27, I All E.R. at 410-11. These limitations, however, have had little effect on the ability of juries in Great Britain to award supplemental damages, since "aggravated damages" are available in most civil actions for tort, and can be given "to soothe the injured

feelings of a plaintiff, . . . [for] insolence or arrogance" or similar reasons. G. Williams & B. Hepple, Foundations of the Law of Tort 69 (1976); see J. Fleming, The Law of Torts 584-85 (5th ed. 1977), in which the author notes the similarity between exemplary damages and aggravated damages.

The limitation in Rookes has been considered in the major common law jurisdictions that apply Magna Carta and English Bill of Rights principles, including Australia, Canada, Ireland, and New Zealand. Each country has rejected the Rookes limitations,[2] giving the doctrine of punitive damages a "wider interpretation." Owen, Punitive Damages in Products

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[2]Australia, Uren v. John Fairfax & Sons, [1967] A.L.R. 25; Canada, McElroy v. Cowper-Smith & Woodman, [1967] 62 D.L.R. (II) 65; McKinnon v. F.W. Woolworth Co., [1968] 70 D.L.R. (II) 280; Bahner v. Marwest Hotel Co., [1969] 6 D.L.R. (III) 22; New Zealand, Fogg v. McKnight, [1968] N.Z.L.R. 330.

Liability Litigation, 74 Mich. L. Rev. 1257, 1264, n.23 (1976). Prior to Rookes v. Barnard, British courts considered punitive damages at great length and in detail. In each instance, punitive damages were found to be fundamental to the British legal system.[3] So deeply entrenched is the doctrine of punitive damages in Great Britain that Lord Demming refused to follow the limitations of Rookes v. Barnard in his decision to award punitive damages in Broome v. Cassell & Co., [1971] II Q.B. 364, 368-69. This refusal to follow Rookes was rebuked on appeal. Cassell & Co. v. Broome, [1972] A.C. 1027.

Without going further into the intricacies of British legal doctrine, it is

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[3]See Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd., [1934] 50 T.L.R. 581, 582; Rook v. Fairrie, [1941] I K.B. 507, 516; Knuppfer v. London Express Newspapers Ltd., [1943] I K.B. 80, 85; Lewis v. Daily Telegraph, [1963] I Q.B. 340, 381; E. Hulton & Company v. Jones, [1910] A.C. 20, 25.

clear that punitive or exemplary damages are alive and well in Commonwealth countries. The 1964 Rookes limitations are the result of the intrusive role played by the higher British courts in the affairs of inferior courts and have nothing to do with the constitutional or historical contentions of the appellant. In the absence of a federal system, it is not uncommon for the House of Lords to engage in a review of jury verdicts. In contrast, it would be most unusual for the United States Supreme Court to become involved in a day-to-day assessment of jury verdicts in civil punitive damage cases, determined under state law, involving two private parties.

II

THE PROHIBITIONS OF THE EIGHTH AMENDMENT ARE APPLICABLE TO CRIMINAL SANCTIONS. PUNITIVE DAMAGES ARE NOT CRIMINAL SANCTIONS.

A. The History of the Excessive Fines Clause of the Eighth Amendment Suggests that the Framers Intended to Keep in Check the Power of the Executive to Impose Excessive Fines in Criminal Cases.

The history of the excessive fines clause in the English Bill of Rights is straightforward: the drafters were concerned with "[t]he recent perversions of the judicial prerogatives of the Crown." 6 W. Holdsworth, A History of English Law 232 (1924). Their concerns focused on the mode of criminal punishment, controlling excessive bail and fines, and placing controls on the use of criminal treason trials. Holdsworth, supra, at 233-34, 410-12. Justice Story's treatise on the U.S. Constitution demonstrates the effect of the British experience on the U.S. Bill of Rights: "It was, however, adopted as

an admonition to all departments of the national governments, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 J. Story, Commentaries on the Constitution of the United States 623-24 (4th ed. 1873) (footnote omitted). The English Bill of Rights is the direct source of the Eighth Amendment.

It has been argued that the excessive fines clause of the Eighth Amendment applies to civil proceedings, notwithstanding the history of the English Bill of Rights. However, in Ingraham v. Wright, 430 U.S. 651, 665-66 (1977), this Court analyzed the history of the Eighth Amendment, paying particular attention to the question of whether it applied to matters beyond criminal prosecutions. The case holds that the three clauses of the amendment were designed "to limit the

power of those entrusted with the criminal-law function of government." 430 U.S. at 664. Making reference to an earlier draft of the Eighth Amendment that explicitly included a "criminal case limitation on the Eighth Amendment," this Court held:

> [A]lthough the reference to 'criminal cases' was eliminated from the final draft, the preservation of a similar reference in the Preamble (footnote omitted) indicates that the deletion was without substantive significance. . . . [T]he principal concern of the American Framers appears to have been with the legislative definition of crimes and punishments. . . . But if the American provision was intended to restrain government more broadly than its English model, the subject to which it was intended to apply--the criminal process--was the same.

430 U.S. at 665-66. Quite obviously, the Eighth Amendment was read by this Court as applicable only to criminal cases.

The conclusions of this Court in Ingraham are consistent with the histori-

cal perspective of the amendment.[4] It is difficult to identify any original source material devoted exclusively to the excessive fines clause, since most of the principals were arguing for an amendment to control criminal sanctions and thus did not address individually fines, bail, or punishment. Typical of this dialogue is the commentary of Brutus II (penname of Melanthon Smith, a New York State anti-federalist strategist), who wrote that adoption of the Bill of Rights was essential "for the security of life, in criminal prosecutions, ..." To accomplish this objective, Smith sponsored an amendment that guaranteed that "excessive bail

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[4] See R. Perry & J. Cooper, Sources of Our Liberties, Documentary Origin of Individual Liberties in the United States Constitution and Bill of Rights 238 (1972); B. Schwartz, A Commentary on the Constitution of the United States (pt. 3) p. 754 (1968), discussing the Eighth Amendment prohibitions as a cure for problems relating to "monetary fines as penalties for criminal offenses."

should not be required, nor excessive fines imposed."[5]

It is illogical to assert that a clause designed to control the criminal enforcement power of the federal government has an original meaning that allows it to be used to place controls on one state's implementation of its civil justice system. It is certainly understandable that parties confronted with civil fines or punitive damages would seek constitutional protection. However, civil sanctions are the province of the state courts and legislatures and are not matters for assessment under the Eighth Amendment excessive fines clause.[6]

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[5]Brutus II, To the Citizens of the State of New York, New York Journal, November 1, 1987, reprinted in 13 The Documentary History of the Ratification of the Constitution, 1 Commentaries on the Constitution: Public and Private, 21 February to 7 November 1787, pp. 524, 527 (Kaminski & Saladino eds. 1981).

[6]City of Scranton v. Peoples' Coal Co., 274 Pa. 63, 117 A. 673, 676, (1922); Dalton v. Bob (cont'd)

B. Punitive Damages Are Not Criminal Sanctions.

In Solem v. Helm, 463 U.S. 277 (1983), this Court held that the principle of proportionality should be applied to criminal sentences assessed under the Eighth Amendment. United States v. Ward, 448 U.S. 242 (1980), permits certain proceedings labeled "civil" to be analyzed as if they were "criminal" for purposes of Eighth Amendment review, raising two central questions for this case. First, are punitive damages criminal sanctions, thus activating the principle of proportionality? Second, should the Court find punitive damages are in the nature of criminal sanctions, does the Mississippi scheme for imposing punitive damages pass constitutional muster? See Discussion, Part III, infra.

Neill Pontiac, Inc., 476 F. Supp. 789, 797, n.13 (M.D.N.C. 1979); Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir. 1967); United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957).

Punitive damages serve multiple purposes including punishment, a function also served by the criminal law. The mere fact that one of the purposes underlying punitive damages is similar to one of the purposes underlying criminal law does not change the stark legal fact that punitive damages are recognized to "have long been a part of traditional state tort law." Silkwood v. Kerr-McGee, 464 U.S. 238, 255 (1984).

Implicitly, Silkwood allows for the recognition of different protective regimes within our legal system. In limited circumstances, punitive damages are available to private persons who have been wronged by gross misconduct. Civil fines address governmental needs, insuring the implementation of legislatively-mandated

behavioral norms,[7] and are subject to scrutiny by the federal courts, while punitive damages are subject to scrutiny pursuant to state tort law principles. 464 U.S. at 257.

To move punitive damages into the domain of civil fines and then move civil fines into the domain of criminal fines would require large jurisprudential leaps, ignoring whole blocks of established precedent. Recently the Court made quite a clear distinction between fines "paid to the state as an abstract and impersonal entity, often calculated without regard to the harm the defendant has caused . . . ," Kelly v. Robinson, ___ U.S. ___, 107 S.Ct. 353, 361, n.10 (1986), and punitive damages, referred to as a system of "wholly private penalties. . . ." 107 S.Ct. at

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[7] 42 U.S.C. § 2011 et seq. (1976 ed. and Supp. V) provides the Nuclear Regulatory Commission with the ability to seek civil fines for noncompliance with various rules pertinent in the Silkwood case.

362, n.13. The notion that punitive damages are wholly different than civil or criminal fines is common to our jurisprudence.[8]

In San Francisco Civil Service Assn. v. Superior Court of Marin County, 16 Cal. 3d 46, 127 Cal. Rptr. 131, 544 P.2d 1331 (1976), the court confronted the question of whether civil fines for raw sewage discharge were similar in character to punitive damages. The court held that a civil fine could "be imposed upon a public entity because the monies thereby collected civilly are not punitive damages. . . ." 16 Cal. 3d at 49, 127 Cal. Rptr. at 134, 544 P.2d 1334. This position is reflected in the Restatement (Second) of

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[8] In Palmer v. A.H. Robins, 684 P.2d 187, 217 (Colo. 1984), the Colorado Supreme Court was asked to analogize a punitive damage system to a fine system without limits. The court found the excessive fines clause "has no application to a civil proceeding involving a punitive damage claim ancillary to a civil cause of action."

Torts: "Punitive damages are to be distinguished from qui tam awards and civil penalties or forfeitures." § 908 Restatement (Second) of Torts, comment a (1977).

A transformation of punitive damages from a civil to criminal sanction can occur if it is clear that the legislative sanction was written with the purpose of establishing a penalizing mechanism and is overtly punitive in purpose and effect based on the precedent and history of the sanction. United States v. Ward, 448 U.S. 242, 248-49 (1980). To succeed in this metamorphic venture, the appellant must establish by "only the clearest proof" that the state legislature had engaged in a drastic form of mislabeling. Cf. Fleming v. Nestor, 363 U.S. 603, 617 (1960).

It is hard to see how punitive damages can be considered criminal, based on the above proof standard, particularly

since this Court has recently held that they are "part of traditional state tort law" and that they are not civil fines. Silkwood, 464 U.S. at 255. They are not legislatively-created sanctions. They are the consequence of state common law. They derived from the system of private wrongs, not public wrongs. There is not a single instance in all of American jurisprudence in which a court has accepted the proposition that a state common law tort remedy (not a legislative sanction) could somehow be recharacterized as a criminal sanction. To blur the distinction between civil private redress and criminal sanction would throw our jurisprudence back to the thirteenth century, to a time where the distinctions between civil law and criminal

law, public fines and private remedies, were difficult to delineate.[9]

It has been argued in prior cases that punitive damages are similar to criminal sanctions and that this imposition would offend double jeopardy prohibitions, if there is a state criminal prosecution addressing the same misconduct. The profound distinction between private civil punitive damages and criminal enforcement, however, prompts many courts to take the position that "when exemplary damages are justified, they

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[9]Normally, to be covered under the excessive fines clause, the fine must be "money exacted from a person guilty of a crime as pecuniary punishment." South Carolina State Highway Dept. v. Southern Ry., 239 S.C. 227, 122 S.E.2d 422, 424 (1961). From the broader perspective of a state "excessive fines" clause, the fine must be a "penalty exacted by the state for some criminal offense." State of Montana v. State Board of Equalization, 133 Mont. 43, 319 P.2d 1061, 1063 (1958). Even so, it has been suggested that if a court were to characterize punitive damages as a civil penalty, "the Eighth Amendment argument is inapposite." United States v. Stangland, 242 F.2d 843, 848 (7th Cir. 1957).

should not be withheld merely because a civil or criminal penalty has been or may be imposed." Security Aluminum Window Mfg. v. Lehman Associates, 108 N.J. Super. 137, 260 A.2d 248, 254 (1970). A number of jurisdictions allow juries to consider the fact of criminal prosecution in assessing the amount of punitive damages, e.g., Hanover Insurance v. Hayward, 464 A.2d 156, 159 (Me. 1984).

As a matter of policy and practice, there are significant differences between the objectives underlying criminal law enforcement and civil punitive damages.[10] First, criminal enforcement is intended to punish those who have violated rules pertinent to the public at large. Punitive damages redress a violation of a private nature. Second, criminal enforce-

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[10]These are discussed in greater detail in Part III. However, these "beneficial" aspects of punitive damages highlight the difference between punitive damages and criminal enforcement.

ment holds the possibility of the denial of liberty interests, a matter that cannot be readily equated with any form of civil sanction. Third, criminal enforcement in the area of insurance bad faith is almost nonexistent, thus providing only the most theoretical deterrent.[11] In contrast, punitive damages have had a substantial and beneficial effect on practices in the insurance industry. Fourth, punitive damages accommodate a retributive interest

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[11] See generally Levine, Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions, 13 U.S.F. L. Rev. 613, 619-20 (1979). Appellants argue that punitive damages ought to be awarded, if at all, in proportion to the Mississippi criminal sanctions pursuant to Miss. Code Ann. § 83-5-33 (1972), although this statute does not cover insurance bad faith nonpayment based on a plain reading of Miss. Code Ann. 83-5-35, which defines "deceptive practices." Further, there is no record that reveals whether any statutory criminal enforcement has ever occurred in the bad faith area. Finally, the lack of criminal enforcement in the insurance bad faith area is readily ascertainable in many states. See, e.g., 14c Tex. Ins. Code Ann. § 21-21-2 (Vernon 1981); N.Y. Ins. Law § 2601 (Consol. 1985); La. Rev. Stat. Ann. § 1214 (West 1978); Mass. Ann. Laws. Ch. 176d § 3 (1987).

unmet in criminal enforcement. Unlike the criminal justice system, where fairness concerns make it difficult for certain types of victims even to be heard in court, the civil punitive damage system provides victims with recourse based on the nature of the wrongfulness of the act occasioned upon them. Booth v. Maryland, 55 U.S.L.W. 4836 (U.S. June 15, 1987).

C. Punitive Damages Are Part of Our Common Law Heritage.

In Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851), this Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated. Further, the Day Court suggested that punitive damages were not "criminal in character." Id. In Missouri Pacific Ry. v. Humes, 115 U.S. 512, 521 (1885), this Court approved the use of punitive damages to "blend together the interests of society and the aggrieved individual." The Court went on to note

that such awards were a matter for the jury and were not bound by "very definite rules," yet "the wisdom of the practice" was not debatable. Quite clearly, the nineteenth century view of punitive damages was that the doctrine was "too well settled now to be shaken, that exemplary damages may in certain cases be assessed." Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 492 (1875). State courts reflect the same perspective, finding punitive damages appropriate based on the manner in which an injury was inflicted "whether by negligence, wantonness, or with or without malice." Fleet & Semple v. Hollenkemp, 52 Ky. (13 B. Mon.) 175, 180 (1852); Merrells v. The Tariff Mfg. Co., 10 Conn. 388 (1835); Linsley v. Bushnell, 15 Conn. 225 (1842).

This Court considered the constitutionality of punitive damages in Minneapolis & St. Louis Ry. v. Beckwith, 129

U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages . . . cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." These holdings reflect the history of punitive damages. Looking to the legal systems in the United States, Great Britain, and even to Roman law, it is evident that punitive damages are a fundamental part of our jurisprudence.[12]

More recently, this Court allowed the use of punitive damages against law enforcement officers even though such damages might have a chilling or intimidating effect on certain law enforcement functions. In Smith v. Wade, 461 U.S. 30 (1983), this Court determined that puni-

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[12] D. Pugsley, The Roman Law of Property and Obligations 31 (1972); B. Nicholas, Roman Law 210 (1962); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1262, n.17 (1976); The Vitality of the Doctrine of Punitive Damages in Maine, 35 Me. L. Rev. 447, 451 (1983).

tive damages could be awarded by a jury in actions brought pursuant to 42 U.S.C. § 1983 (1982). The opinion does not address the question of damage limits, though it does confirm the validity of punitive damages as a deterrent to misconduct. 461 U.S. at 36-37, n.5.

An equally difficult but substantively different application of punitive damages occurs in the area of defamation. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court considered the chilling force of punitive damages in defamation cases, and determined that such awards were proper so long as the state applied the conventional malice test used in this area even when dealing with private plaintiffs. This standard was modified in Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), permitting punitive damages without a finding of actual malice so long as the

speech does not involve matters of public concern.

Both Smith v. Wade and Gertz permit an endorsement of punitive damages in extraordinarily complex policy settings, and both cases maintain punitive damages without damage proportionality rules even though there are powerful contrary federal policy considerations. Given that history, one is hard pressed to see why punitive damages ought to be prohibited or modified in a state insurance bad faith case where there are no overt federal interests.

III

PUNITIVE DAMAGES PLAY A VITAL ROLE IN THE AMERICAN CIVIL TORT SYSTEM. A DECISION CURTAILING PUNITIVE DAMAGES WOULD HAVE A SEVERE AND ADVERSE EFFECT ON THE AMERICAN CONSUMER.

Punitive damages are a civil remedy available to private parties and are not the proper subject for review under the Eighth Amendment excessive fines clause.

Outside of apparent constitutional interests, such as implementation of federal civil rights laws or First Amendment matters, punitive damages are best left to the decisionmaking of each individual state. However, should this Court determine that a substantive review of punitive damages is in order, then the following concerns become relevant.

A. A Fixed Limit or Preestablished Ratio for Punitive Damages Would Frustrate the Purposes Underlying Punitive Damages.

A decision that compels the states to establish fixed ratios or clearly-delineated proportions in punitive damages would allow business interests to calculate easily the proper sum to be set aside to accommodate judgments. This would have a disastrous effect on the deterrent value of punitive damages. "Conscious wrongdoers must know they cannot estimate the cost of their misdeeds by coldly calculating the number of dead or injured and

their resulting limited compensatory expenses. They must know that their financial existence may be threatened by the evil they contemplate." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 833 (1987).

The lack of preestablished ratios has been considered by the courts in the past. In many cases courts favor an individualized punitive damage system not bound by mathematical equations. "The admonitory function of punitive damages does not lend itself to formulation. . . . The refusal to specify a ratio is due to the need to individualize punitive damage verdicts. One must look to behavior, not to results, to determine the need to admonish, and . . . the amount which must be awarded. . . ." Campus Sweater & Sportswear Co. v. M.V. Kahn Construction

Co., 515 F. Supp. 64, 106 (D.S.C. 1979).[13] Other courts[14] have struggled to find a proper calculation mechanism but have come up empty handed:

> Frankly, we are unable to find that formula. Instead of making a mathematical breakthrough we discovered what everyone probably already knows: the formula does not exist. And, we have concluded, that is properly so.
>
> Although we may now live in a highly computerized society, it is important to recognize that the justice system need not and should not mirror a mechanistic view of life. . . . Accordingly, we examine the usual factors recited by appellate courts when reviewing punitive damage awards, applying those factors in the customary manner to reach what we believe is a decision consistent with precedent.

Devlin v. Kearney Mesa AMC/Jeep Renault,

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[13] See Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1173, 1180-81, n.9 (1931), rejecting proportional ratios as "arbitrary"; Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1258, 1316 (1976), rejecting ratios due to their failure to take into account appropriate damage factors.

[14] Linsley v. Bushnell, 15 Conn. 225, 235 (1842), "there is no rule of damages fixed by law" to accommodate punitive damages.

155 Cal. App. 3d 381, 202 Cal. Rptr. 204, 209 (1984).

Many states follow the lead of the Mississippi courts:

> [There] is no inflexible guide by which the jury can be conducted to their determination of the amount of the penalty which must be inflicted to adequately punish the culprit and protect the public. . . . They [the jury] cannot be directed or required to award any sum in punitory damages, no matter how flagrant the transgression of private or public right. . . .

Yazoo & M.V.R. Co. v. Williams, 87 Miss. 344, 39 So. 489, 492 (1905).[15]

Although this Court has not addressed the matter specifically, it has suggested that a plaintiff's entitlement to the

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[15] See Malco v. Midwest Aluminum Sales, 14 Wis.2d 57, 109 N.W.2d 516 (1961); Foster v. Floyd, 276 Ala. 423, 163 So. 2d 213 (1964); Note, Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose, 9 Pac. L.J. 823, 852 (1979); Borowsky, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 164-65 (1983), condemning the reasonable relation rule as a decisional pretext; Restatement (Second) of Torts § 908, comment c (1977), permitting substantial punitive damages where actual damages are nominal.

"recovery of uncertain damages" is not flawed constitutionally and that defendants are entitled to certainty in ascertaining what conduct is wrong, but they are not entitled to certainty "in respect to [the] . . . amount" of damages. Story Parchment v. Patterson Parchment Paper, 282 U.S. 555, 562 (1930). Recently, this Court characterized punitive damages as a "legal remedy that is not a fixed fine." Tull v. United States, ___ U.S. ___, 107 S.Ct. 1831, 1838, n.7 (1987). Tull follows well established precedent that defendants have no particular entitlement to a fixed maximum in cases where punishment is in the form of a fine. Standard Oil Co. of Indiana v. Missouri, 224 U.S. 270, 286 (1911) (applying this principle in a quo warranto proceeding). Accordingly, the lack of a fixed limit on a fine does not present any constitutional infirmity.

If the essence of the appellants' contention is that a punitive damage award without a clear limitation is unconstitutional, the overwhelming body of authority rejects that proposition. Finally, a fixed ratio or set sum creates the very real possibility that punitive damages will be awarded irrationally, since the amount of compensatory damages, the likely multiplier, bears little relation to the degree of culpability of the actor.[16]

B. It Is Appropriate That Punitive Damages Are Provided to the Plaintiff.

It has been argued that the sole function of punitive damages is punishment and deterrence. However, a careful inquiry into the field of punitive damages reveals that they serve multiple purposes.

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[16] A ratio rule "undermines the deterrent effect of punitive damages by stressing the actual resulting harm rather than the social undesirability of the defendant's conduct." Comment, Punitive Damages: An Appeal for Deterrence, 61 Neb. L. Rev. 651, 676 (1982).

There is little question that punitive damages provide resources to an aggrieved plaintiff who, through no fault of his or her own, has been thrust into an abnormal risk category.

Individuals who suffer at the hands of others whose behavior is sufficiently bad to be characterized as gross or wanton misconduct are in no way winners of some bizarre lottery. The destruction of family life, the trauma of protracted litigation, the displacement of emotional equilibrium, and various costs[17]

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[17]In some states, notably Connecticut, punitive damages are permitted explicitly for the purpose of assisting with attorneys fees so long as they do not exceed two times compensatory damages. The general rule in that state is that punitive damages are "essentially compensatory, not punitive. . . ." Lanese v. Carlson, 32 Conn. Supp. 163, 344 A.2d 361, 364 (1975); Doroszka v. Lavine, 111 Conn. 575, 578, 150 A. 692 (1930). Other jurisdictions allow punitive damages for "inconvenience, reasonable attorneys fees, and other losses too remote to be considered under actual damages." Pan Am Petroleum v. Hardy, 370 S.W.2d 904, 908 (Tex. Civ. App. 1963). Beyond deterrence and punishment, Mississippi recognizes that punitive damage awards encourage private (cont'd)

pertaining to pursuing legal claims can be addressed by a punitive damage award. Owen, supra, at 1296-98.

The notion that plaintiffs receive resources beyond compensation when their injuries are the result of egregious misconduct is rarely addressed in practical terms. Policy concerns surrounding unjust enrichment promote only nominal analysis.[18] It is time to be more forthright.[19]

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persons to bring wrongdoers before the court. Snowden v. Osborne, 269 So. 2d 858 (S.Ct. Miss. 1972).

[18]To be sure, many argue that direct payment to plaintiff is particularly troubling due to what they see as the "tort crisis." The best thinking in the area is that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, New Light on Punitive Damages, Regulation 33, October 1986; Burrow & Collins, Insurance Crisis--Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform, 18 St. Mary's L.J. 673, 695 (1987).

[19]A few states are more straightforward in discussing punitive damages; Hicks v. Herring, 246 S.C. 429, 144 S.E.2d 151, 155 (1965), allows puni- (cont'd)

C. Punitive Damages Improve Business Practices and Upgrade Product Quality.

While there are various concerns associated with punitive damages, there is little dispute that punitive damages have a salutary effect on practices in the insurance industry, improving processes associated with handling claims and providing better, more understandable information to insurers. Levine, supra, at 625; Kornblum & Thornton, The Seismic Impact of Punitive Damages in Actions Against Insurers, 77 Best's Rev. 36, 44 (1976); Levitt, Punitive Damages--Preventative Steps, 1973 Ins. L. J. 332.

In evaluating punitive damages in the insurance industry, one is compelled to take a hard look at what motivates liability insurance corporations. Some

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tive damages to vindicate a private right. Jolley v. Puregro Co., 94 Idaho 702, 496 P.2d 939, 947 (1972), permits punitive damages for "rectification of wrongs"; Oppenhuizen v. Wennersten, 2 Mich. App. 288, 139 N.W.2d 765 (1965), permits punitive damages to address embarrassment.

commentaries are quite frank:

> [L]iability insurers are not in business to compensate injured persons, but, rather, to maximize profits for their stockholders. This they can accomplish only by avoiding the payment of compensation--by denying or defeating as many claims as they can, and by paying as little as possible on the rest. The costs incurred in this process may be expensive . . . but that is precisely how the system is designed to function. Calling it a "compensation system" and expecting it to perform as though it were is as naive as calling a jackass a thoroughbred and expecting it to win the Kentucky Derby.

E. Bernzweig, By Accident Not Design: The Case for Comprehensive Injury Reparations 86 (1980). Given the potential of this corporate inclination, some balancing factor is required. "The disparity in wealth between an insurer and an insured is itself evidence of the need to deter the defendant insurer from wielding the power incident to such wealth in an unfair and oppressive manner." Levine, supra, at 636.

It is argued regularly that compensa-

tory damages are sufficient to cover the needs of injured persons and to provide sufficient deterrence to future misconduct.[20] Such arguments are devoid of empirical support.[21] Many cases where punitive damages are awarded reflect a pattern of misconduct on the part of the defendant, repeated over a period of

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[20]It is also the case that many of the legal mechanisms designed to address corporate misconduct have not lived up to their promise. Schwartz & Adler, Product Recalls: A Remedy in Need of Repair, 34 Case W. Res. 401 (1984).

[21]Walker v. Sheldon, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961); Campus Sweater & Sportswear Company v. M.B. Kahn, 515 F.Supp. 64, 104-05 (D.S.C. 1979), holding that punitive damages deter manufacturers from misconduct, encourage the production of safer products, and "serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys." The court held further "there is no exact monetary standard which can be used as a measure. . . . There is no formula for punitives as the amount to be awarded is particularly within the judgment and discretion of the jury, subject to the supervisory powers of the trial judge over jury verdicts. . . . The main things to be considered are the character of the tort committed, the punishment which should be meted out therefore, and the ability of the wrongdoer to pay." 515 F.Supp. at 105-06.

years, interspersed with various compensatory damage awards. Compensatory awards have not deterred the defendants, prompting the Supreme Court of Minnesota to conclude that punitive damages are particularly effective in preventing repetitive forms of misconduct. Gryc v. Dayton-Hudson, 297 N.W.2d 727 (Minn.), cert. denied, 449 U.S. 921 (1980).

In the insurance industry, a compensatory damage award is likely to be little more than the amount of money to which the insured was entitled under the policy in the first instance had litigation not been initiated. A result of the elimination of punitive damages will be to increase the economic incentive for insurers willfully to deny claims on unjust grounds.

D. The System Mandating Jury Determination of Punitive Damages, Coupled With Judicial Review Is Proper and Sufficient to Assure a Just Outcome.

Giving juries decisionmaking authority in the punitive damage area

based on carefully-evolved state standards conforms with a uniformly-held perception that juries are our best guard against misuse of power. Taylor v. Louisiana, 419 U.S. 522, 530 (1975). We trust juries to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). Since this Court is willing to allow juries to decide matters of life and death, they should be trusted "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 824 (1987).

Implicit in the appellants' challenge is the assertion that juries will, somehow, make inaccurate or unfair determinations for punitive damages. At least three times in the recent past this Court

remarked on the capacity of juries to ass ss punitive damages, not questioning the competence of the citizenry to make intelligent and fair judgments.[22] The confidence of this Court in the ability of juries to make intelligent judgments is reflected at the state level.[23]

In Mississippi, punitive judgments are "left to the sound judgment of the

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[22] City of Newport v. Fact Concerts, 453 U.S. 247, 270 (1981); Electrical Workers v. Foust, 442 U.S. 42, 50-51 (1979); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).

[23] See Brink's v. City of New York, 546 F. Supp. 403, 413 (S.D.N.Y. 1982), holding that for punitive damages the "jury functions in a quasi-judicial capacity and is vested with broad discretion. . . . The court may intervene and set aside a verdict when the amount of the award is so excessive that it shocks the judicial conscience or it appears that it is result of passion and prejudice"; Gulf Atlantic Life Insurance Co. v. Barnes, 405 So. 2d 916, 925 (Ala. 1981), holding "the amount of damages is left largely to the discretion of the jury; however, this discretion is not absolute"; Tri-Tron Int'l v. Velto, 525 F.2d 432, 438 (9th Cir. 1975), holding: "courts will not interfere with the award unless it appears to have been influenced by passion, prejudice, or some improper motive, or unless it is outrageously disproportionate either to the wrong, or the situation or circumstance of the parties."

jurors. This province of the jury should not be interfered with, unless it should appear that the amount awarded was so apparently excessive as to show passion and prejudice. . . ." Yazoo & M.V.R. Co. v. May, 104 Miss. 422, 61 So. 449, 450 (1913). More recent Mississippi decisions suggest some refinements on the review standard.[24]

Although the standard for review in Mississippi provides the jury with considerable latitude, the admonition against excessiveness is not a hollow one. In Jesco v. Shannon, 451 So. 2d 694, 704 (Miss.), cert. denied, 469 U.S. 1073 (1984), the Supreme Court of Mississippi refused to allow a punitive damage

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[24]Commodore v. Bailey, 393 So. 2d 467, 471-72 (Miss. 1981), holding that a jury award for punitive damages can be set aside if it is "arbitrary or unreasonable. The amount cannot be determined by any fixed rule"; Reserve Life Insurance v. McGee, 444 So. 2d 803 (Miss. 1983), suggesting that review is also available for "exceptional causes."

instruction based on an insubstantial assertion of the willfulness of the defendant's misconduct. In addition to conventional review in Mississippi, courts can avail themselves of remittitur pursuant to Miss. Code Ann. § 11-1-55 (Supp. 1986). Through conventional review, remittitur, and properly-phrased jury instructions, the process of awarding punitive damages proceeds in a fair way, fully consistent with the obligation of the state of Mississippi to implement its judicial system in a manner that comports with fundamental due process.[25]

CONCLUSION

It has been demonstrated that neither history, precedent, nor policy support a reversal of the Mississippi Supreme Court. There is no generic principle of propor-

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[25]The Mississippi system conforms with the decisionmaking and review recommendation of § 908 Restatement (Second) of Torts (1979).

tionality commanding fixed ratios or pre-established limits in punitive damage cases. There is no constitutional basis to review punitive damages under the Eighth Amendment. Finally, a close look at punitive damages reveals a useful, fair, and beneficial system.

Respectfully submitted,

Andrew F. Popper
Counsel of Record
The American University
Washington College of Law
Washington, DC 20016
(202) 885-2645
Attorney for Amici Curiae
Consumers Union, Consumer Federation of America, and the National Consumer League

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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE and CASUALTY COMPANY
Appellant,

vs.

LLOYD M. CRENSHAW,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE INSURANCE CONSUMER ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF APPELLEE

MARIAN HAYCOCK TULLY, ESQ. *
SHERNOFF & LEVINE

600 South Indian Hill Boulevard
Claremont, California 91711
(714) 621-4935

* Counsel of Record

Attorneys for Amicus Curiae
Insurance Consumer Action Network

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

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No. 85-1765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

BANKERS LIFE and CASUALTY COMPANY
Appellant,
vs.
LLOYD M. CRENSHAW,
Appellee.

BRIEF OF THE INSURANCE CONSUMER ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

With the consent of the parties, the Insurance Consumer Action Network respectfully submits this brief as *amici curiae* in support of appellee. Copies of letters of both parties confirming this consent have been filed with this court.

The Insurance Consumer Action Network (ICAN) is a non-profit, non-partisan organization formed by California consumers to assist policyholders and claimants get insurance claims paid, and to provide public education on claim filing, underwriting and premium setting. ICAN also represents consumers at the California legislature and with the Department of Insurance.

ICAN files this brief because it is concerned that the elimination of punitive damages advocated by appellant would undermine the ability of states to regulate and enforce state laws governing unfair insurance practices.

Summary of Argument

States such as California have painstakingly established standards of conduct for insurance claims handling and the consequences for an insurer's failure to abide by those standards. *State regulation*, by statute and case, *is due process* because an insurer knows that in order to do business in the state certain standards apply and certain consequences may follow if the insurer refuses to operate by those standards. Due process is essentially notice and an opportunity to be heard. States which have laws governing unfair claims practices and apply punitive damages according to particular limiting criteria in a judicial forum provide due process.

As a nationwide fact, punitive damage awards are not excessive. As to this particular case, there is no factual record by which "excessiveness" can be reviewed by this court, and no state court has reviewed the issue.

A.

PUNITIVE DAMAGES ARE NOT "EXCESSIVE FINES" AND DO NOT VIOLATE DUE PROCESS

Punitive damages are not excessive fines, empirically or legally. Empirical data shows that the incidence of punitive damage awards is extremely small and the amounts awarded are not high. As concluded in *Empirical Patterns in Punitive*

Damage Cases: A Description of Incidence Rates and Awards, prepared by the American Bar Foundation for the 1987 Law and Society Association annual meeting in Washington, D.C. on June 12-14, 1987, punitive damage awards are not routinely given, nor are they applied in a haphazard, inconsistent or unfair manner.[1]

As a legal issue, an award of punitive damages in any given case is reviewed several times by different judges and by several different tribunals according to the laws of each state. Any lawsuit in which punitive damages are awarded invariably results in the exercise of the following civil judicial review: demurrer, motion to strike, summary judgment, motion for directed verdict, motion for judgment notwithstanding the verdict, motion for new trial, conditional motion for new trial (and remittitur), lengthy and protracted appeals to intermediate appellate courts, and to the State Supreme Court and, in some instances, request for and review by the United States Supreme Court. Therefore, an award of punitive damages is never based on the sole caprice of a jury acting under passion and prejudice, but is subject to review by more judges than the 12 jurors rendering the verdict.

Appellant's principal compiaint centers upon notice. Bankers Life declares "if the legislature of Mississippi, rather than the Supreme Court of Mississippi, had determined that conduct of the type involved in this case was worthy of criminal punishment, the legislature presumably would have made that determination in a statute which would have given notice with reasonable specificity of the conduct prohibited and would simultaneously have proscribed a range of punishment . . . ".

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[1] Stephen Daniels and Joanne Martin prepared *Empirical Patterns in Punitive amage Cases: A Description of Incidence Rates and Awards* for the American Bar Foundation and presented the study to the 1987 Law and Society Association annual meeting, in Washington, D.C. on June 12-14, 1987 [hereafter A.B.F. Study]. Much of the study was published, *see* Daniels & Martin, *Jury Verdicts and The "Crisis" in Civil Justice*, 11/3 Just. Sys. J. 321 (1986).

Appellant's Brief, p.32. As discussed below, many states have specifically addressed these two concerns, the standard of conduct and the consequences for failing to meet the standard, in the insurance business context. States, such as California, with statutorily mandated fair claims practices and specific guidelines and limitations for an award of punitive damages do not violate due process by assessing excessive fines.

1.

STUDIES BY THE AMERICAN BAR FOUNDATION SHOW THAT PUNITIVE DAMAGE AWARDS ARE NOT EXCESSIVE

Appellant, Bankers Life, argues that the punitive damage award in this case is excessive as part of its argument that all punitive damages are, by definition, excessive fines.

There is no factual record upon which to evaluate the punitive damage award in the instant case. *See "B" infra* p. 17. However, empirical studies show the overall incidence of punitive damage awards is small, the types of cases in which these damages may be awarded are rare, and the actual amounts assessed are low.

A 1987 American Bar Foundation study reviewed punitive damage awards in forty-two counties in ten different states during the early 1980's and five counties in two neighboring states for 1970 through 1985. A.B.F. Study p.3 The information was gathered from local jury verdict reporters with an eye to obtaining a regional balance and comprehensive information with a cross-section of different parts of the country, different size metropolitan areas, different social economic makeup and under the application of differing laws. *Id.* at 4. The report concludes:

> In general, then, while plaintiffs tend to fare well — winning more than fifty percent of the time — plaintiffs are not likely to win very high awards. Interestingly this runs contrary to much of the rhetoric of tort reform which portrays awards as being typically high.

Id. at 7.

* * *

> In no site did as much as 15% of all reported verdicts or 25% of all successful verdicts include an award for punitive damages.

Id. at 9.

* * *

> Median punitive [damage] awards in most sites are modest (below $50,000) . . . Medians in 27 of the 42 sites are $50,000 or less, and in just over half the counties (22) are below $25,000.

Id. at 6-7.

The following graphs are reproduced from the American Bar Foundation study:

OVERALL PATTERNS IN REPORTED PUNITIVE DAMAGE CASES

Site	n	% of All Reported Verdicts	% of All Successful Verdicts
ARIZONA (SUPERIOR COURT)			
Maricopa (1981-1985)	150	8.5	14.6
CALIFORNIA (SUPERIOR COURT)			
Alameda (1981-1984)	16	5.9	10.3
Fresno (1981-1984)	7	5.8	11.9
Los Angeles (1981-1984)	122	5.5	9.8
Sacramento (1981-1984)	20	6.6	11.8
San Diego (1981-1984)	6	2.4	5.0
San Francisco (1981-1984)	40	7.5	12.6
GEORGIA (SUPERIOR COURT)			
Cobb (1982-1984)	11	12.2	19.0
DeKalb (1982-1984)	18	7.5	12.9
Fulton (1982-1984)	38	7.1	12.1

ILLINOIS (CIRCUIT COURT)			
Cook (1981-1985)	68	1.6	2.8
DuPage (1981-1985)	9	2.1	3.7
Kane (1981-1985)	5	2.9	4.8
Lake (1981-1985)	6	2.0	3.4
McHenry (1981-1985)	2	3.3	6.1
Will (1981-1985)	7	2.4	3.9
Winnebago (198101985)	7	4.7	8.0
KANSAS (DISTRICT COURT)			
Johnson (1981-1985)	11	3.5	6.7
Wyandotte (1981-1985)	9	3.1	5.1
MISSOURI (CIRCUIT COURT)			
Clay (1981-1985)	15	14.4	24.2
Jackson (1981-1985)	109	12.2	22.0
Platte (1981-1985)	5	10.6	17.9

OVERALL PATTERNS IN REPORTED PUNITIVE DAMAGE CASES

Site	n	% of All Reported Verdicts	% of All Successful Verdicts
NEW YORK (SUPREME, CIVIL, COUNTY)			
Bronx (1981-1984)	0	---	---
Erie (1983-1984)	0	---	---
Kings (1981-1984)	4	0.5	0.8
Monroe (1983-1984)	4	4.3	7.0
Nassau (1981-1984)	8	1.3	3.1
New York (1981-1984)	22	2.1	3.3
Onondaga (1983-1984)	1	1.5	2.5
Queens (1981-1984)	2	0.5	0.9
Richmond (1981-1984)	0	---	---
Suffolk (1981-1984)	8	2.0	3.6
Westchester (1981-1984)	3	1.3	3.2
OREGON (CIRCUIT COURT)			
Multnomah (1984-1985)	11	3.6	6.4

TEXAS (DISTRICT, COUNTY)			
Dallas (1981-1985)	142	6.7	13.3
Harris (1981-1985)	156	7.8	14.0
WASHINGTON (SUPERIOR COURT)			
King (1983-1985)	0	---	---
Pierce (1983-1985)	0	---	---
Skagit (1983-1985)	1	5.3	6.7
Snohomish (1983-1985)	1	0.9	1.5
Spokane (1983-1985)	0	---	---
Yakima (1983-1985)	1	1.4	2.2

MEDIAN PUNITIVE DAMAGE AWARDS IN REPORTED CASES FOR SITES WITH 10+ CASES (in 1985 DOLLARS)

Site	Median
ARIZONA (SUPERIOR COURT)	
Maricopa (1981-1985)	$26,450
CALIFORNIA (SUPERIOR COURT)	
Alameda (1981-1984)	$89,070
Los Angeles (1981-1984)	$103,600
Sacramento (1981-1984)	$108,000
San Francisco (1981-1984)	$75,340
GEORGIA (SUPERIOR COURT)	
Cobb (1982-1984)	$10,800
DeKalb (1982-1984)	$6,820
Fulton (1982-1984)	$21,252
ILLINOIS (CIRCUIT COURT)	
Cook (1981-1985)	$19,184
Urban Ring	$24,000
KANSAS (DISTRICT COURT)	
Johnson (1981-1985)	$5,570

MISSOURI (CIRCUIT COURT)	
Clay (1981-1985)	$32,400
Jackson (1981-1985)	$14,788
NEW YORK (SUPREME, CIVIL, COUNTY)	
New York (1981-1984)	$51,309
OREGON (CIRCUIT COURT)	
Multnomah (1984-1985)	$26,000
TEXAS (DISTRICT, COUNTY)	$26,500
Harris (1981-1985)	$25,000

2.

DUE PROCESS IS SATISFIED WHEN STATE LAW DEFINES PROHIBITED INSURANCE PRACTICES AND THE STANDARDS BY WHICH PUNITIVE DAMAGES WILL BE IMPOSED WHEN AN INSURER CONDUCTS ITS BUSINESS CONTRARY TO STATE LAW

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945) has declared that *state* regulation of insurance claims practices is in the public interest and that the silence of Congress on the subject was not to be interpreted as invalidating state laws regulating and taxing insurance. The McCarran-Ferguson Act reflects express federal legislative intent to confer insurance regulation upon each of the states. 15 U.S.C. § 1012(b).

In response to the deliberate absence of federal regulation of insurance claims practices, various states have made careful efforts, both legislatively and judicially, to deter unfair and unscrupulous insurance claims practices. Many of the regulatory efforts of the various states are characterized by specific, predictable and flexible statutes which achieve the intended purpose and goal of preventing unfair claims practices.[2]

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[2] Following are a few samples:

In Texas, Insurance Code Article 21.21, § 16(b)(1) provides that the amount of *actual* damages obtained by an insured against an insurer for violation of the Deceptive Trade Practices and Consumer Protection Act (Bus. & Com. Code § 17.46) or the unfair practices set forth in the Insurance Code *must* be trebled if the violation was found to be a "knowing" violation.

In Montana, the Insurance Commissioner may, after a hearing, impose an administrative fine of no more than $1000.00 for each violation of the Unfair Practices Act. (Mont. Code Ann. § 33-18-233.) In addition, the Commis-

(continued)

The Federal Government is not in a position to put limits on punitive damages just as it is not in a position to put limits on the availability of compensatory damages. As shown in the discussion above, jury verdicts depend upon the sensibilities and values in the regions where the injury occurs. The appropriateness of a jury verdict depends very much on local economy, local culture and the appropriate liability analysis in the law of each jurisdiction. Appellant does not argue that criminal sentences should be uniform nationwide to avoid a claim that one state or another is excessive because the Constitution must recognize regional differences and the state's ability to govern its citizens. This argument would be unsuccessful in either criminal or civil law. Since punitive damages are not "excessive" as a matter of fact, the remaining question of due process depends upon notice.

It is abundantly clear that the development of liability for punitive damages, especially in the insurance context, has been widely felt and commented upon by the insurance industry. *See* Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in Insurance Bad Faith Actions*, 13 U.S.F.L. Rev. 613 (1979). The insurance industry

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(ftn. continued)
sioner may issue a desist order (Mont. Code Ann. § 33-18-1004.) Violation of that order will subject the insurer to a civil penalty of $1000.00 per day, for a maximum of $10,000.00. (Mont. Code Ann. § 33-18-1005.)

In Iowa, the Insurance Code provides that the Commissioner may impose a penalty of $1000.00 per violation of the rules under the Code, to an aggregate of $10,000.00. However, if the violator knew or reasonably should have known the rules were being violated, the penalty may be imposed at the rate of $5,000.00 per violation to an aggregate of $50,000.00. (Iowa Ins. Code § 523 C.13.)

The Louisiana Insurance Code provides that an insurer's failure to comply with the sections requiring prompt payment of health, accident and disability benefits shall be liable to the insured for double the benefits owed during the delay and attorneys' fees to be determined by the court. (La. R.S. 22:657.)

has long been aware of the particular requirements for good claims practices and the probable consequences for bad claims practices: "The failure to make prompt settlement of amounts admittedly owing can result in large punitive damage awards for oppression and also subject the insurer to a charge of unfair claims practices" and insurers are well aware that their license may be revoked and that punitive damages are often related to the financial worth of the defendant. Levit, *Punitive Damages Today*, 1974 INS. L.J.483. The entire insurance industry has reacted to the development of insurance law and the incidental application of punitive damage awards in California by changing claims practices. *See* Levine, *supra*, at p. 626. Not only has the insurance industry reacted to the California verdicts, it has reacted with specificity and addressed particular practices in order to avoid future punitive damage awards. *Id.* Clearly the industry is on notice.

Insurance companies operating in California know what the standards of fair claims practices are and what the consequences for failing to meet these standards will be. California Insurance Code Section 790.03 sets out, specifically, what are considered unfair claims practices.[3] California Civil Code

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[3] The California Insurance Code section setting out prohibited practices and upon which punitive damage claims are based is specific:

"§ 790.03 Prohibited acts:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. . .

(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:

(1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(4) Failing to affirm or deny coverage of claims within a

(continued)

Section 3294 states that punitive damages may be awarded in

(ftn. continued)
reasonable time after proof of loss requirements have been completed and submitted by the insured.

(5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(7) Attempting to settle a claim by an insured for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(8) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent, or broker.

(9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.

(10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.

(14) Directly advising a claimant not to obtain the services of

(continued)

cases involving malice, oppression or fraud.[4] Lastly, the California Book of Approved Jury Instruction sets out the particular criteria for a punitive damage award.[5]

(ftn. continued)
an attorney.

(15) Misleading a claimant as to the applicable statute of limitations."

4 California Civil Code § 3294 allows punitive damages:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

5 California juries are instructed:

"If you find that plaintiff suffered damage as a proximate result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant, for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

['Malice' means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [carried on by the defendant with a conscious disregard for the] [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

['Oppression' means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.]

['Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(continued)

Insurance companies doing business in California receive due process because they are well aware of the standard of conduct required and the consequences for failing to meet that standard.

B.

THIS COURT SHOULD NOT EXERCISE JURISDICTION TO CONSIDER A CLAIM OF UNCONSTITUTIONALITY RAISED FOR THE FIRST TIME AFTER A JURY TRIAL, AND WHERE THE STATE COURT HAS NOT RULED ON THE ALLEGED CONSTITUTIONAL ISSUE

As appellant's jurisdictional statement establishes, it first raised the constitutional questions with respect to the issue of punitive damages only *after the trial was over, and on a motion for new trial.* Appellant's Jurisdictional Statement, pp. 10-11. *See also* Appellant's Brief, pp. 1-2. The case proceeded to trial, and the jury heard all the evidence and appellant never claimed any of the constitutional rights now asserted, nor is there anything to show that appellant ever

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(ftn. continued)

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you decide to award punitive damages to plaintiff against defendant, you shall state the amount of punitive damages separately in your verdict." B.A.J.I. *California Approved Jury Instructions, Civil,* 14.71.

requested jury instructions with respect to the constitutional issues it now raises.

Appellant's excuse for failing to make such a claim was that it "could not have known that punitive damages, if awarded at all, would be excessive until after the jury's verdict was rendered." Appellant's Jurisdictional Statement pp. 10-11. Appellant tacitly admits that it kept to itself its constitutional claim *in order to gamble on the verdict* and get two bites of the apple.

We respectfully submit the law is clear that a litigant may not suppress its claims of constitutional rights until a trial is over and then — dissatisfied with the verdict — assert such claims in an attempt to force a time-consuming and expensive repetition of the proceedings.

We respectfully submit, under 28 U.S.C. section 1257, that there is no jurisdiction under these circumstances. Thus, in *Webb v. Webb*, 451 U.S. 493 (1981) this court had before it a Writ of Certiorari from the Georgia Supreme Court. This court dismissed the writ:

> *We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that court.* This court has frequently stated that when 'the highest state court has failed to pass upon a federal question, *it will be assumed that the omission was due to want of proper presentation in the state courts* unless the aggrieved party in this party in this Court can affirmatively show the contrary.' [Citations]

451 U.S. pp. 495-496 (Emphasis added) (*See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, fn.3 (1983).

The Mississippi Supreme Court did not even mention appellant's constitutional claims, let alone rule on these issues. We

therefore respectfully submit that appellant's claim of a federal constitutional issue, first presented on a motion for new trial is untimely. "Ordinarily, the federal issue is presented too late if it is first raised in a motion for new trial." 16 Wright, Miller, Cooper and Gressman, *Federal Practice and Procedure* (1977), section 4022, p. 701. This court has so held in *Barbour v. State of Georgia*, 249 U.S. 454, 460 (1919), a decision which was cited with approval in *Yakus v. United States*, 321 U.S. 414, 444 (1944) and has never been disapproved or overruled.[6]

The reason for the rule requiring that federal issues be timely presented to the state court confirms that appellant's failure to do so is fatal to its claim of jurisdiction. As this court stated in *Webb v. Webb, supra*, the requirement of timely preservation affords the parties the opportunity "to develop the record necessary for adjudicating the issue"; it permits the state courts to exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges; insures that if there are independent and adequate state grounds that would determine the federal issue they will be identified

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6 Although appellant claims — (Jurisdictional Statement pp.10-11) that *Chambers v. State of Mississippi*, 410 U.S. 284 (1973) may be an exception to this rule (16 Wright, Miller, Cooper and Gressman, *supra*, p. 702, fn. 23), in *Chambers*, a criminal case, *the defendant objected at the trial* to the individual evidentiary rulings. At the conclusion of the trial, defendant claimed that the cumulative effect of these rulings was a denial of due process, and this court held that this claim could not have been raised and ruled upon prior to the conclusion of defendant's evidentiary presentation. 410 U.S. at p. 290, fn.3. Moreover, this court observed that the state had never claimed that the constitutional issue was not raised. *Ibid.* *See* 16 Wright, Miller, Cooper and Gressman, *supra*, p.702.

and acted upon in an authoritative manner[7] and allows state tribunals to adjudicate the federal claims, which may thereby "obviate any reason" for this court to give "plenary consideration to the case." 451 U.S. at 500.

Similarly, in *Illinois v. Gates*, 462 U.S. 213 (1983), this court refused to consider a constitutional claim not pressed or passed upon in the state court, noting that questions not raised below are those on which the record is very likely to be inadequate since it was not compiled with the constitutional questions in mind. 462 U.S. at 221.

These considerations are particularly applicable to the case at bar. As we understand it, appellant claims that the present proceeding violated the excessive fines clause in the United States Constitution in the following respects: (1) The punitive damage award was "grossly disproportionate to actual damages"; (2) it was "vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities" and; (3) it was imposed under a newly formulated standard of conduct and applied retrospectively. Appellant's Jurisdictional Statement, p. 16.

Obviously, each of these claims could and should have been ruled upon by the state courts. Appellant could have, for example, requested that the jury be instructed in accordance with its claim that the constitution requires that a punitive damage award not be "grossly disproportionate" to the actual damages. Appellant argues, citing *Solem v. Helm*, 463 U.S. 277 (1983) that certain factors determine whether a criminal sentence is constitutionally excessive. *See* Appellant's Brief at 32. Had appellant raised this issue in the trial court, the trial court could have considered the presence or absence of

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[7] Thus, in the present case there is reason to believe that Mississippi state law prohibits excessive fines in the same manner as the United States Constitution. Simply put, the majority of the Mississippi Supreme Court did not believe the award was excessive. As discussed above, appellant wishes this court to review this essentially factual issue on an empty record.

these factors in the present case, make evidentiary rulings accordingly and give appropriate jury instructions. Instead, appellant asks this court to adjudicate these factual questions absent any factual record at trial.[8]

We therefore respectfully submit that this court should be kind jurisdiction in this case, in view of the inadequate record due to appellant's failure to raise the constitutional issue

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[8] Appellant's brief itself states that the failure to raise the issue at the trial deprives the parties of "the opportunity to develop the record necessary for adjudicating the issue." *See Webb v. Webb, supra.* There was no evidence with respect to other Mississippi criminal statutes that might be applicable or analogous and no evidence or argument as to whether Mississippi law provided this relatively low fine in its criminal statute because Mississippi did not wish to consume the scarce resources of government and law enforcement and believed that private enforcement through punitive damage awards as a deterrent made it unnecessary to enact criminal statutes assessing large fines. Appellant has discovered a new statute not mentioned in its jurisdiction statement, which it claims demonstrates that the punitive damage award is beyond any criminal penalty. Appellant's Brief at p. 14. Appellant claims that if Mississippi had prosecuted it for violating that statute, (Mississippi Code Ann. § 83-5-33 (1972)) it would have been entitled to a trial with "the full panoply of procedural safeguards accorded to criminal defendants" Appellant's Brief at 14 — safeguards which appellant never asked for in this case until it was too late to provide them.

Moreover, appellant omits to mention that Mississippi law permits the Insurance Commissioner to charge insurance companies with undefined acts of unfair competition and practices (Mississippi Code Ann. § 83-5-45 (1972)), to issue cease and desist orders, and to punish violators of such orders not only with the small fines cited by appellant *but also by revoking their license to do business in Mississippi* (Mississippi Code Ann. § 83-5-49 (1972)). In the light of these penalties, it is doubtful that the punitive damage award exceeds the criminal sanctions but here, again, this is a factual issue that could have been resolved had appellant timely raised it.

during the trial.[9]

This issue is of more than technical interest. State legislatures and courts work long and hard to make laws, enforce them and adjudicate disputes arising from the application of those laws. Insurers and others defending punitive damage claims often refrain from raising constitutional issues for tactical reasons.[10] To permit appellants to preserve the excessive fines issue by raising it post-trial will result in undermining the Mississippi legislature and judicial system and the proliferation of litigation, including appeals and petitions to this court.

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9 Even if appellant had raised one of the two alleged constitutional questions in timely fashion this does not bestow jurisdiction on this court with respect to the other questions. *See, e.g., Illinois v. Gates, supra,* 462 U.S. 213, and *Exxon Corp. v. Eagerton, supra,* 462 U.S. 176, where this court refused to decide the questions that had not been timely presented, but did decide other questions which had been timely presented.

10 The most common example is with respect to a contention that the burden of proof should be the criminal burden of beyond a reasonable doubt. Civil defendants are reluctant, as a matter of tactics, to receive an instruction to that effect in many cases, because punitive damage cases also involve compensatory damage issues. Defendants often believe that instructing the jury on a higher burden of proof on one issue disadvantages them before juries on the issue with a lesser burden of proof, and they deliberately elect to gamble on the punitive instruction to better their chances on the compensatory claim.

We can only speculate on the reasons that appellant did not raise the issue in the trial court at bar. We are confident, however, that it was not because its counsel were unaware of this possible issue. Appellant's claim that it could not have known that punitive damages would be of a size it considered excessive (Appellant's Jurisdictional Statement at 10) is, we respectfully submit, fatuous. Appellant always knew of the possibility that an award it could profess to be excessive might be assessed against it. This is demonstrated in its own "jurisdictional statement" wherein it states that the present decision is not "an aberration" (Jurisdictional Statement at 19), *i.e.*, it is not the type of result that could not be anticipated.

C.

THIS COURT SHOULD DISMISS THIS CASE AS MOOT IN VIEW OF *PILOT LIFE v. DEDEAUX*

In *Pilot Life Ins. Co. v. Dedeaux*, ___ U.S. ___, 107 S.Ct. 1549 (1987) and *Metropolitan Life Ins. Co. v. Taylor*, ___ U.S. ___, 107 S.Ct. 1542 (1987), this court held that the Employee Retirement Income Security Act 29 U.S.C. section 1001, *et seq* (1974) preempted a Mississippi common law cause of action for bad faith arising out of an insurance company's improper processing of a claim for benefits under an ERISA-regulated employee benefit plan.

The present case probably involves such a plan, since the subject insurance policy was a group accident policy purchased by appellee's employer. *See* Appellant's Jurisdictional Statement at p. 5, Opinion of the Mississippi Supreme Court, 483 So.2d 254, 256.[11] It has been held that whether such a policy is governed by ERISA is a question of fact. *See Donovan v. Dillingham*, 688 F.2d 1367 (11 Cir. 1982). *Compare Taggart Corp. v. Life and Health Benefits Admin.*, 617 F.2d 1208 (5th Cir. 1980) *cert. den. sub. nom. Taggart Corp v. Efros*, 450 U.S. 1030 (1981); *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977).

If ERISA, in fact, applies to the subject insurance policy, the constitutional controversy is moot.[12]

---

11 This Court's decision in *Pilot Life v. Dedeaux* issued after the Petition for Writ of Certiorari was granted in this case.

12 In view of the significance of the *Pilot Life* decision and the vast number of ERISA cases pending and which would be affected by the holding in this case, we believe that this cause should be dismissed as improvidently granted. Furthermore, although ordinarily it could be said the appellant has waived the point by failure to raise it, in the present case, appellant's failure

(continued)

CONCLUSION

The judgment of the Mississippi Supreme Court should be affirmed or, in the alternative, this court should decline to exercise jurisdiction and dismiss.

Respectfully submitted,

MARIAN HAYCOCK TULLY
Counsel of Record

SHERNOFF & LEVINE

Attorneys for Amicus Curiae
Insurance Consumer Action
Network

(ftn. continued)
to raise the point involves extraordinary circumstances. It may be ascribed to the desire of the insurance industry to secure a favorable decision on the claimed constitutional issue. In sum, appellant may be seeking to confer jurisdiction on this court by concealing an issue which should be properly decided by the lower courts. Appellant's strategy may be to persuade this court to reverse this case on the punitive damage issue, after which the case will be placed at large for further proceedings. When it is returned to the lower court, appellant can then seek to file pleadings raising the ERISA defense. While this strategy is ingenious, under the circumstances of this case, it amounts to an improper attempt to secure an advisory opinion from this court.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant

v.

LLOYD M. CRENSHAW,
Appellee

On Appeal from the Supreme Court of Mississippi

BRIEF OF THE MISSISSIPPI TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

PAUL S. MINOR
Counsel of Record
MINOR AND BENTON
P.O. Drawer 1388
Biloxi, MS 39533
(601) 374-5151
Attorneys for Amicus Curiae Mississippi Trial Lawyers Association

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 85-1765

BANKERS LIFE AND CASUALTY COMPANY,
Appellant

v.

LLOYD M. CRENSHAW,
Appellee

On Appeal from the Supreme Court of Mississippi

BRIEF OF THE MISSISSIPPI TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

STATEMENT OF INTEREST

With the consent of the parties, the Mississippi Trial Lawyers Association (MTLA) respectfully submits this brief as amicus curiae in support of Appellee.[1]

The Mississippi Trial Lawyers Association is a voluntary association comprised of over 800 trial lawyers. The majority of its members practice frequently in both state and federal courts, regularly engaging in the representa-

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[1] Letters of both parties confirming consent are being filed simultaneously with this Court.

tion of individuals who have sustained bodily injury or property damage, and those who are victimized by consumer fraud. The MTLA, through its appropriate officers and committees, has authorized participation in this case as amicus curiae.

The Mississippi Trial Lawyers Association is particularly concerned with questions affecting the rights of litigants in federal and state courts in Mississippi and the preservation of the adversary system of justice. The majority of its voting members currently represent clients whose rights would be affected by the Court's opinion on the constitutional validity of Miss. Code Ann. Section 11-3-23 (Supp. 1986).[2]

The MTLA believes that it would substantially harm the appellate system in Mississippi if this statute were invalidated. Further, this Association believes that a ruling against the constitutionality of the statute would set a dangerous precedent which would radically alter principles of federalism that are the cornerstone of the system of justice in this country.

SUMMARY OF ARGUMENT

Miss. Code Ann. Section 11-3-23 (Supp. 1986) serves important functions in the appellate system of the State of Mississippi: (1) it curbs abuses of Mississippi's automatic right of appeal to the Mississippi Supreme Court; (2) it protects the state court from meritless appeals that further contribute to an already staggering case load; and (3) it compensates appellees for the economic and emotional toll an appeal entails.

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[2] MTLA also agrees with Appellee and supporting amicus curiae that Mississippi state law authorizing punitive damages is not an unconstitutional exercise of the state's authority to devise remedies for particular types of harm and that the constitutional questions advanced against the punitive damages award are not properly before the Court. As this issue has been extensively briefed, we write separately to address 11-3-23 only.

The statute embraces purely state concerns and does not violate the United States Constitution because it is ratioanlly related to important state objectives. It applies equally to plaintiffs and defendants, the amount of the damages it authorizes compensates the successful appellee in a rational manner, and it targets those judgments where the incentive to appeal is high regardless of the merits. Indeed, this Honorable Court long ago recognized a state's right to impose a mandatory penalty on unsuccessful appellants. *Louisville & N.R.R. Co. v. Stewart*, 241 U.S. 261 (1916).

Both the Mississippi legislature and the Mississippi Supreme Court have recognized the vital role served by 11-3-23 in curbing abusive appeals and controlling Mississippi's staggering case load. Since the statute implicates no federal concern, this Honorable Court should not displace the state judicial and legislative judgment.

ARGUMENT

I. SECTION 11-3-23 IS A VALID EXERCISE OF MISSISSIPPI'S RIGHT TO ESTABLISH APPELLATE PROCEDURES.

Appellant has totally failed to establish even a threshhold showing that Mississippi's appellate damages statute should be subjected to equal protection scrutiny. Indeed, since Appellant cannot prove that access to Mississippi's appellate court has been arbitrarily denied to any discrete class of litigants, this state rule of procedure is a valid exercise of the legislature's authority to control the appellate process.

This Court has consistently recognized that a basic tenet of federalism requires each state to be charged with the authority "to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exer-

cise." *John v. Paullin*, 231 U.S. 583, 585 (1913). Because Miss. Code Ann. 11-3-23 (Supp. 1986) is a legitimate regulation of Mississippi appellate practice and procedure, and because it serves important state interests in curbing abusive appeals to an overburdened Mississippi Supreme Court, this Court should adhere to its long-standing rule that the federal court system will defer to the state's judgment on questions concerning the administration of their judicial systems. *Pennzoil Co. v. Texaco, Inc.*, —— U.S. ——, 107 S.Ct. 1519 (1987); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977).

A. Background.

Mississippi is one of few states that does not have an intermediate court of appeals. Moreover, although there is no guaranteed constitutional right to appeal,[3] the Mississippi legislature has decreed that the Mississippi Supreme Court, consisting of nine (9) justices, has appellate jurisdiction over all matters originating in any of Mississippi's lower trial courts, as well as numerous administrative agencies.[4] Thus, any Mississippi litigant who is dissatisfied by a decision of any lower tribunal may ap-

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[3] The right to appeal is not a fundamental right required by the Constitution. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The Mississippi Constitution guarantees the right to appeal only a decision of the justice court. Miss. Const. Art. VI, Sect. 171 (Supp. 1986).

[4] Mississippi's trial courts consist of 20 circuit courts, which preside over civil and criminal matters, and 20 chancery courts, which preside over equity proceedings, including domestic relations, guardianships, and the like. In addition, Mississippi has 17 county courts, 79 city courts, one family court, and numerous justice courts. Appeals from these inferior courts with limited jurisdiction are made in the first instance to the appropriate circuit or chancery court, with the Supreme Court being the court of last review. Similarly, parties aggrieved by administrative action may appeal to the Mississippi Supreme Court after having their appeal first reviewed by the appropriate circuit court. Mississippi Judiciary Directory and Court Calendar (Miss. Secretary of State, 1987).

peal as a matter of right to the Mississippi Supreme Court.[5]

While the legislative decision to allow appeals as of right is salutary in purpose, "an unfettered automatic right of appeal brings its own evils" and invites unsuccessful litigants to appeal merely "to squeeze a favorable settlement out of an impecunious plaintiff" and for other less laudable reasons. *Walters v. Inexco Oil Co.*, 440 So.2d 268, 275 (Miss. 1983).

As a result, the Mississippi Supreme Court's case load is staggering. As of December 31, 1986, the Mississippi Supreme Court had pending 1,131 cases.[6] Each of Mississippi's nine Supreme Court Justices authored on the average 65 written opinions in 1986.[7] Notwithstanding this valiant effort, there remains an average of approximately two years from date of judgment appealed from to decision by the Mississippi Supreme Court.[8] As this statistic includes summary affirmances without oral argument or written opinion, the true average for cases actually decided after the full adjudicatory appellate process approximates four years, as occurred in this case. In fact, some appellate decisions have taken as long as seven years.[9] Thus, "the greatest problem facing the [Mississippi Supreme Court] for the past number of years is the backlog of cases." [10]

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[5] Because of the State's economically depressed condition, no proposal for intermediate courts of appeals has been entertained seriously by the state legislature.

[6] Mississippi Supreme Court Annual Report, at 3 (1986).

[7] *Id.*, at 8.

[8] *Id.*, at 7.

[9] *Id.*

[10] "The Mississippi Supreme Court: A Justices' Profile", *Mississippi Lawyer*, May-June, 1987, at 9 (quoting Chief Justice Harry Gray Walker).

In the absence of intermediate courts of appeals, the Mississippi legislature devised a method to deter meritless appeals by the enactment of Miss. Code Ann. 11-3-23, which imposes additional damages, constituting 15% of the value of the underlying judgment, on an appellant who unsuccessfully appeals a money judgment or possessory action to the Mississippi Supreme Court.[11]

Prior to imposing the statutory damages on an unsuccessful appellant, there must be (1) a final judgment [12] (2) of the type specified by the statute,[13] which is (3) *unconditionally* affirmed [14] by (4) the Mississippi Supreme Court. The Mississippi legislature acted well within its

[11] Unlike interest, the 15% award is not calculated on a per annum basis; rather, it constitutes a one time, lump sum additional award only on the underlying judgment and not on any interest accruing during the appeal.

[12] The statute applies only when appellant has exercised his absolute right to appeal a final judgment. As an interlocutory appeal requires permission of the court, appellant is not solely responsible for the appeal; therefore, the statute is inapplicable to interlocutory appeals. *Canal Bank & Trust Co. v. Brewer*, 147 Miss. 885, 113 So. 552 (1927).

[13] The statute expressly applies to any judgment for (1) a sum of money, (2) possession of real or personal property, (3) dissolution of an injunction involving real or personal property, (4) the sale of property to satisfy a sum out of the proceeds of sale, and (5) enforcement or establishment of a lien, charge, or claim upon property.

[14] Any modification whatsoever will render the damages statute inapplicable. *See, Illinois Cent. R. Co. v. George*, 241 Miss. 233, 130 So.2d 260 (1961) (statutory damages not allowed where supreme court affirmed award of damages but reversed award of injunction); *Shipman v. Lovelace*, 215 Miss. 141, 144-45, 60 So.2d 559, 560-61 (1952) (statutory damages not awarded when appellant received some relief not previously granted); *Mississippi Hwy. Comm'n v. Burwell*, 206 Miss. 490, 497, 40 So.2d 263, 263 (1949) (statutory damages not awarded when affirmance is conditioned on a remittitur). In addition to unconditional affirmances, the statute likewise applies to appeals that are dismissed. Section 11-3-23.

authority in passing this state law to "curb abuses" of Mississippi's absolute right of appeal. *See, Walters, supra*, at 277. Thus, both the Mississippi legislature and the Mississippi Supreme Court have determined that 11-3-23 is necessary to curb appellate abuses.

B. The Statute is Rationally Related to Valid State Objectives.

Where, as here, a statutory regulation involves neither a fundamental right nor a suspect classification, state legislation is presumed to be valid. *See, McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The Court must uphold a legislative enactment if it serves any "plausible reason." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *McGowan, supra*, at 426 (statute may not be set aside "if any state of facts reasonably may be conceived to justify it."). By raising contrived and unproven imperfections in the sweep of the statute, Appellant would have this Court displace legislative judgment if any conceivable set of facts demonstrated any possible flaw in state laws concerning purely state matters. This may not be done.[15] Quite simply, the statute is eminently constitutional, both on its face and as applied.[16]

[15] As this Court has held, "[o]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, 362 U.S. 17, 21 (1960).

[16] Appellant cannot strongly contend that the statute is facially defective, as it applies to all unsuccessful appellants, whether plaintiff or defendant, who appeal from an order permitting recovery. *See, Wallace v. Jones*, 360 So.2d 932, 933-34 (1978) (upholding constitutionality of 11-3-23 on these grounds); *Pearce v. Ford Motor Co.*, 235 So.2d 281 (Miss. 1970) (applying 11-3-23 to unsuccessful plaintiff-appellant). Accordingly, Appellant must show the statutory damages are unconstitutional under the facts of this case.

In fact, the proposition that a state may impose a mandatory penalty on an appellant when a judgment is affirmed was established long ago. In *Louisville & N.R.R. Co. v. Stewart*, 241 U.S. 261 (1916), Justice Holmes, writing for a unanimous Court, held that a state's decision to make an appeal costly by imposing a 10% penalty, automatically assessed in all unsuccessful appeals, was justified where, as here, appellant was provided with a suspension of the judgment.[17] *Id.*, at 263. The application of 11-3-23 in this case was identical to the application of the Kentucky statute upheld in *Stewart*. In light of *Stewart*, 11-3-23 is a reasonable legislative enactment designed to serve Mississippi's vital interest in deterring meritless appeals.

C. Appellant's Arguments are Devoid of Merit.

Defendant summarily concludes that the appellate damages statute is unconstitutional for the following reasons: (1) it burdens Appellant's exercise of its right to appeal; (2) it is allegedly "overinclusive" and "underinclusive"; (3) it allegedly bears no relationship to costs incurred by

[17] Although this Court concluded in *Burlington Northern R.R. Co. v. Woods*, —— U.S. ——, 107 S.Ct. 967, 970 n.4 (1987), that "[t]he Mississippi statute applies without regard to whether the judgment has been stayed pending appeal," the only two decisions in which 11-3-23 was applied to unsuspended judgments involved special circumstances warranting the imposition of statutory damages. Since *Meek v. Alexander*, 102 So.2d 69 (Miss. 1924), involved partial payment made pursuant to an agreement that the money would be repaid in the event of reversal, appellee did not have unfettered use of even the partial payment, and imposition of statutory damages was appropriate. Similarly, *Tigner v. McGehee*, 60 Miss. 242 (1882), involved a judgment for foreclosure which, even though not stayed, constituted a cloud on the title of property that prevented appellee's right to dispose of the property. *See*, Miss. Code Ann. 11-49-1 *et seq.* (1972) (discussing state lis pendens procedures). In any event, this Appellant, who appealed with supersedeas, may not challenge the statute on the grounds that it may not be permissibly applied to judgments that are not stayed. *See*, n.16, *supra*.

the Appellee in defending the appeal; and (4) it allegedly treats litigants differently. Each contention is wholly without merit.

1. The Statute Does Not Infringe Upon Appellant's Right to Appeal.

Appellant relies solely on this Honorable Court's decision in *Lindsay v. Normet*, 405 U.S. 56 (1972),[18] which is totally inapplicable in this case for two reasons: the double bond requirement affected poor tenants and "foreclosed their right to appeal." *Id.*, at 79. In contrast, the appeal statute at issue in this case in no way infringes upon the ability of any party to appeal to the Mississippi Supreme Court, as it imposes no condition whatsoever that must be met prior to the appeal, in the absence of which the appeal will be barred.

Rather, the statute merely provides for payment of additional damages at the conclusion of the appeal. There has been absolutely no showing that 11-3-23 has barred any appeal by any party at any time. Even more importantly, the statute obviously did not deter this Appellant from taking its appeal to the Mississippi Supreme Court. Accordingly, this Appellant may not challenge the constitutionality of the appeal statute on these grounds.[19]

[18] *Lindsay* involved impoverished tenants who attempted to withhold rent until their dwellings were fit for habitation. Aware that Oregon law would have resulted in a bond requirement double the value of rents accruing during the pendency of appeal, and unable to afford same, the tenants filed a declaratory judgment action in federal court. In holding this condition for appeal invalid, the Court noted that "[t]he discrimination against the poor . . . is particularly obvious" and that the requirement foreclosed their right to appeal. *Id.*, at 79.

[19] As observed in *Myron v. Chicoine*, 678 F.2d 727, 730 (7th Cir., 1982), before bringing a constitutional challenge, "it is incumbent upon a litigant to demonstrate an injury which is real, not imaginary; concrete, not abstract; apparent, not illusory; and demonstrable, not speculative." *See also, Brockett v. Spokane Arcades, Inc.*,

2. *The Statute is Reasonably Tailored to Achieve Legitimate State Purposes.*

A state legislature is not held to the level of perfection in the enactment of its statutes. Thus, a state statute is not invalid because it is incomplete, because it affects more people than it should, or because it does not include every class of persons who are in need of regulation.[20] Indeed, this Court has long held that "the drawing of lines that create distinctions is peculiarly a legislative task and an unenviable one. Perfection in making the necessary classifications is neither possible nor necessary." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Such legislative action offends the equal protection clause only if it rests on grounds "wholly irrelevant to the achievement of the state's objective." *Lindsay, supra*, at 70.

The appellate damages statute responds to the necessity of "curbing abuses" of Mississippi's absolute right of appeal so that the Mississippi Supreme Court will be protected "from being required to spend its time and energy and resources on appeals thoughtlessly taken" and to "provide[e] a measure of compensation for the successful appellee . . . for his having endured the slings and arrows of successful appellate litigation." *Walters, supra*, at 274-77. Clearly, the statute bears a rational relationship to these objectives. Moreover, the statute applies to all appellants of money judgments, plaintiff and defendant, "rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness."[21] *See, Lindsay, supra*, at 70.

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472 U.S. 491, 501, 502 (1985); *Warth v. Seldin*, 422 U.S. 490 (1975).

[20] *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *Clements v. Fashing*, 457 U.S. 957, 971 (1982).

[21] In addition, the same persons or entities can be and often are both plaintiffs and defendants in the courts of Mississippi, and

Appellant argues that the statute is overinclusive because the damages may be imposed on "substantial" appeals. This is incorrect, however, for as previously demonstrated if an appeal is modified in any fashion whatsoever, then the appellant is deemed to have prevailed to such an extent that statutory damages will not be imposed.[22] While Appellant would obviously prefer to risk appeal, regardless of merit, to the Mississippi Supreme Court without incurring additional costs, the legislative decision to apply the statute in all cases of unsuccessful appeals is clearly a reasonable one in light of the Mississippi Supreme Court's heavy case load.[23]

Appellant also states that the damages statute is underinclusive "in that Mississippi does *nothing* to penalize the taking of frivolous appeals by plaintiffs who fail to secure money judgments at the trial level or who cross-appeal in an attempt to secure an even larger judgment."[24] Brief for Appellant, at 47 (emphasis in original). This statement is not only legally irrelevant to a determination of whether the statute bears a "rational

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while they may be subject to the damages provided by Section 11-3-23 in one case, they may reap its benefits or be exempt from it in others. This is particularly true of insurance companies who frequently defend claims against themselves or their insureds and prosecute subrogation cases.

[22] *See*, note 14, *supra*.

[23] *See*, text at nn.6-10, *supra*. A grant of exceptions from the strict, mandatory application of 11-3-23 would require the state to hold individualized hearings whenever a plea for exemption was made. Mississippi clearly has a rational basis for adopting a consistent rule applying to appeals of all money judgments. *Cf. Pennzoil Co. v. Texaco, Inc.*, —— U.S. ——, 107 S.Ct. 1519 (Stevens, J., concurring).

[24] The rationale for not imposing the statutory damages on a cross-appellant is based on the fact that the cross-appellant merely follows the case to the Supreme court and does not bring it there. *Ellis v. Merchants & F. Bank*, 193 Miss. 557, 10 So.2d 541, 541 (1942).

relation" to valid state objectives, but, in addition, is factually incorrect. In order to complement the appellate damages statute and provide for sanctions for the taking of any frivolous appeal, the Mississippi Supreme Court recently adopted Mississippi Rules of Appellate Procedure. Rule 38 of these Rules provides as follows:

> In a civil case to which Miss. Code Ann. Section 11-3-23 (Supp. 1986) does not apply, if this Court shall determine that an appeal is frivolous, it shall award just damages and single or double costs to the appellee.[25]

Thus, if an appeal is of a money judgment or other judgment within 11-3-23, then either party who appeals may be subjected to statutory appellate damages. Similarly, if the appeal is of a type not covered by 11-3-23, then either party who appeals may be subjected to the frivolous appeal damages provided by Miss. R. App. P. 38. By promulgating this additional rule, and leaving intact 11-3-23, the Mississippi Supreme Court has again established the vital interest served by statutory damages and has concurred with the Mississippi Legislature's wisdom in taking steps necessary to curb abuses of the appellate process.[26]

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[25] Miss. R. App. P. Rule 38. The Comment to the Rule provides:

> Unlike Fed.R.App.P. 38, this rule applies only to civil appeals, and does not apply to criminal cases. The rule applies when an appeal is frivolous. There is no requirement that the appeal have resulted in delay.
>
> The damages to be awarded may include attorneys fees and other expenses incurred by an appellee. Interest is treated separately and is governed by Rule 37.
>
> This rule supplements and does not supplant the statutory 15% penalty now provided by Miss. Code Ann. Section 11-3-23 (Supp. 1986).

[26] The Appellate Rules, which were adopted on July 6, 1987, will become effective on January 1, 1988. In actuality, of course, neither the adoption of this Rule nor its absence at the time Appellant's

Moreover, the legislature was justified in determining that parties who have obtained a money judgment may be tempted to put the other party to the task of a lengthy appeal merely "to subject their adversaries to more costs and expense [and] to squeeze a favorable settlement out of an impecunious plaintiff." *Walters, supra,* at 275. Plaintiffs who have failed to obtain a verdict in their favor are not as likely to take an appeal for these reasons since, having lost at the trial court level, the pendency of an appeal would have minimal effect on their chances of securing a favorable settlement. Similarly, unlike an appellant who has been ordered to pay money or deliver property to the other party, a losing plaintiff in such a case does not retain on appeal anything that has been found to be owed to his adversary.[27] For these reasons, the legislature's decision to impose statutory damages only on parties appealing from money and similar judgments is a reasonable one.

The fact the Mississippi statute applies to all litigants, plaintiffs and defendants, who appeal from a money judgment is a critical distinguishing characteristic from the *Lindsay* double bond requirement which applied only to tenants. Indeed, two courts of appeals have relied upon this distinction in rejecting equal protection challenges to

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appeal was filed has any bearing on the constitutionality of 11-3-23. Indeed, had this Rule been in effect during the course of this appeal, it would not have altered the result in any way. In any event, however, the Mississippi Supreme Court has always had the inherent power to assess damages for frivolous appeals even in the absence of 11-3-23. *See, Newell v. State,* 308 So.2d 71, 76 (Miss. 1975) (Supreme Court has inherent power to promulgate procedural rules).

[27] Of course, the same potential "evils" discussed in *Walters* may apply to a successful plaintiff who, having obtained a money judgment, may feel he can "squeeze some more" out of defendant by challenging the adequacy of the verdict on appeal. For this reason, the statute applies to all appellants whether plaintiff or defendant. *See, Pearce v. Ford Motor Co.,* 235 So.2d 281 (Miss. 1970).

a double bond provision in the Commodities Exchange Act of 1936, 7 U.S.C. Sections 1 *et seq.* *See, Myron v. Martin*, 670 F.2d 49, 53 (5th Cir. 1982), ("[s]ince the double bond requirement applies equally to all persons whom the commission has ordered to pay a reparation award [the appellant] is not denied equal protection."); *accord, Myron v. Chicoine*, 678 F.2d 727 (7th Cir. 1982).

Since the double bond requirement at issue in *Martin* and *Chicoine* is constitutional, the Mississippi statute is likewise immune to challenge. This is especially true since unlike the double bond provision, 11-3-23 has no economic impact on the appellant until after the judgment has been unconditionally affirmed by the Mississippi Supreme Court.

The speciousness of Appellant's argument is also evident upon examination of the portions of the statute which were upheld in *Lindsay*. These provisions, which drastically limit the issues in unlawful entry and detainer actions and provide for only two to four days notice to the defendant prior to trial, were upheld as being rationally related to the state's interest in providing speedy trials in these actions.[28]

Moreover, because this Court has expressed a "minimal concern" with the outcome of the typical civil case involv-

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[28] *Lindsay, supra,* at 69-74. This Oregon statute, peculiar to FED actions, was upheld as rationally related to Oregon's legitimate interest in providing speedy trials since the landlord otherwise would suffer undeserved economic consequences from lengthy holdovers by tenants. However, the economic consequences suffered by landlords are no different from economic consequences suffered by many other types of appellees due to the delays inherent in our appellate system. Similarly, although Mississippi might have an interest in discouraging all meritless appeals (and in fact has adopted rules to this effect), it has acted well within its discretion in targeting those actions that have consequences peculiar to appeals of money judgments.

ing a monetary dispute between the parties,[29] the Mississippi legislature wisely responded to the needs of this state's judiciary by determining that unmeritorious appeals of money judgments should be subjected to statutory damages. Under binding Supreme Court precedent, the Mississippi legislature has acted well within constitutional parameters in treating appeals of money judgments and valuable property rights differently than it treats other causes of action.

3. *Statutory Damages are Rationally Related to Damages Sustained by Appellee on Appeal.*[30]

Appellant summarily concludes that 11-3-23 bears no relationship to its asserted purpose of providing "compensation" to the prevailing appellee. However, Appellant overlooks that the compensation which the Mississippi legislature has deemed to be appropriate includes not only damages for costs and attorneys fees but, more broadly, "compensation for his having endured the slings and arrows of successful appellate litigation." *Walters, supra*, at 274-75. An appellee loses more, much more, during a four-year appeal period than mere costs and attorneys fees. The economic reality is that Mississippi's statutory post-judgment interest of 8% was grossly insufficient to compensate Appellee for the fact that Appellant, during the appeal period of high interest rates, was in possession of what had been found after a full jury trial to be Appellee's property, i.e., its monetary damages.[31]

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[29] *Rivera v. Minnich*, 55 U.S.L.W. 5075, 5076 n.5 (June 25, 1987). *See also, Addington v. Texas*, 441 U.S. 418, 423 (1979).

[30] If this Honorable Court finds that 11-3-23 is rationally related to the state's interest in curbing abusive appeals, then it need not consider Appellant's argument that it bears no relation to the statute's compensation purpose, for this state legislation must be upheld so long as "any state of facts reasonably may be conceived to justify it." *McGowan, supra*, at 426.

[31] As noted in Appellee's Motion to Dismiss, the prevailing interest rates on money market accounts at the time the judgment was

Even more significant is the emotional toll an appeal takes on a litigant. Because this type of damage is particularly insusceptible of precise calculation, it becomes apparent that the state legislature is in the best position to determine how to compensate an appellee for this type of intangible damage. Recognizing that the actual damages sustained are not capable of mathematical precision, the state legislature reasonably elected to express these damages as a percentage of the judgment. In short, statutory damages contained in 11-3-23 are rationally related to the state's legitimate interest in providing compensation to an appellee who successfully defends his case on appeal.[32]

4. *The Damages Statute Operates in an Even and Equal Fashion.*[33]

Appellant argues that, by virtue of 11-3-23, it and Appellee did not "enter the courts upon equal terms."

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entered was double the 8% post-judgment appeal rate provided in Miss. Code Ann. Section 75-17-7. Indeed, the Mississippi Supreme Court has recognized that "an aggregate of prevailing market interest rates and the annual inflation rate has greatly exceeded the 8% per annum legal rate of interest." *Walters, supra,* at 275. Moreover, this Honorable Court has recognized that "special statutory treatment" is appropriate when one litigant is in possession of property of the other litigant. *See, Lindsay, supra,* at 72.

[32] By suggesting that the statutory damages imposed in the case *sub judice* constitute "a penalty on a penalty," in effect, Appellant argues that statutory damages should not be awarded when the money judgment consists of punitive damages. Again, Appellant ignores both the economic and noneconomic harm suffered by an appellee during the pendency of an appeal. Moreover, the statute would be especially susceptible to challenge on equal protection grounds if it applied only to merely negligent defendants and exempted those appellants, such as Bankers Life, who have been found to be guilty of gross misconduct.

[33] Appellant argues that this Court should find 11-3-23 to be unconstitutional even if it is " 'reasonably tailored' to achieve the purposes of the statute as articulated by the court below" as it treats litigants differently. Brief of Appellant, at 48. Of course,

Brief of Appellant, at 48. This is absolutely untrue, for the statute clearly applies to all plaintiffs[34] and defendants who appeal from a money judgment or other type of judgment mentioned in 11-3-23.[35] Because it equally applies to all appellants of money judgments, the Mississippi Supreme Court upheld the statute on equal protection grounds over 25 years ago. *Wallace v. Jones*, 360 So.2d 932, 933-34 (Miss. 1960).

As previously established, all parties have an unburdened right to appeal to the Mississippi Supreme Court. In order to determine whether the statute applies equally, "we must look at the matter from the vantage point of the prospective appellant immediately after the rendition of the original judgment in the trial court." *See, Walters, supra,* at 277. When viewed in this manner, it is clear that both parties to a money judgment action may "enter the courts upon equal terms." *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 153 (1897).

On December 11, 1981, when the circuit court jury of Jackson County, Mississippi, rendered its verdict for

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once this Court has concluded that the statute is rationally related to legitimate state objectives, the inquiry ends, as the classification is then determined to be reasonable. *See, Lindsay, supra,* at 74.

[34] *See, Pearce v. Ford Motor Co.*, 235 So.2d 183, 183 (Miss. 1970); *Eagle Lumber & Supply Co. v. Robertson*, 161 Miss. 17, 165 So. 499, 500 (1931). Similarly, Defendants often "prevail" even though damages are awarded if the judgment is less than adequate to compensate the plaintiff for his injuries. When a judgment is rendered, the litigants stand on equal ground. It is the fact that a money judgment is awarded that brings the statute into play. If the judgment is inadequate, the plaintiff who appeals is subject to the same risks as the defendant, and he, too, must carefully weigh the chances that 11-3-23 damages will apply.

[35] *Rinaldi v. Yeager*, 284 U.S. 305 (1966), relied upon by Appellant, involved a state law that required only incarcerated criminal defendants to reimburse the state for transcript costs following an unsuccessful apeal. As 11-3-23 applies to all appellants of money judgment, *Rinaldi* does not support Appellant's contention.

money damages in this case, both the Plaintiff and the Defendant in the court below had the same right to exercise an appeal to the Mississippi Supreme Court. In addition, by virtue of 11-3-23, both Plaintiff and the Defendant faced the same risk in perfecting an appeal, which might be unsuccessful. Specifically, if Plaintiff were dissatisfied with the amount of the verdict and wished to appeal, then he would have known that he risked losing 15% of his damages if the appeal were unsuccessful. Defendant, in contemplating appeal, had to consider the same risk, that is that if its appeal were unsuccessful, it would be required to pay an additional 15% of the money judgment. Thus, the identical financial burden is imposed upon all parties who are involved in litigation resulting in a money judgment.

Appellant cannot credibly argue that on the critical date in question, that is the date the judgment was obtained, it was not on an equal standing with Appellee, for it clearly was. Rather, Appellant's real criticism is that it not only lost at the trial court level but, furthermore, the Mississippi Supreme Court found no merit in any of its assignments of error. Such dissatisfaction is not constitutionally protected.

In fact, if this Court finds that the statute is violative of due process [36] or equal protection, it will call into ques-

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[36] Defendant mentions the due process clause only in passing and has apparently foregone its argument that a hearing was required to determine the merits of his appeal prior to imposition of 11-3-23. The notice requirement of the due process clause was certainly met in this case as the statutory damages imposed by 11-3-23 are well known to all appellants, and the potential additional damages that may be incurred if the appeal is affirmed unconditionally is susceptible of precise calculation. As to the hearing requirement, Appellant received a full hearing before the nine Justices of the Mississippi Supreme Court, who held Appellant's appeal to be without merit. This hearing surely comports with the notice and hearing requirements and, in fact, is probably more process than is due.

tion every statute which assesses damages or a penalty based upon a percentage of the amount in controversy. Assessment of damages or penalties by percentages of the amount in controversy is relied upon in many state and federal statutes, including the United States Tax Code,[37] and we respectfully urge this Court to keep the door closed to challenges to state and federal statutes which authorize automatic assessment of a percentage of the money, or the value of the property at issue.

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[37] Among the statutes that would be particularly susceptible to challenge are penalties or damages relating to judicial proceedings, *see, e.g.*, Alabama Code Section 12-22-75 (1975) (automatic 10% penalty for unsuccessful appeal of money judgment); Arizona Rev. Stat. Ann. Section 12-2106 (1956) (authorizing damages for frivolous appeals of money judgments not to exceed 10% of judgment and not to exceed $500.00 in other cases); Or. Rev. Stat. Section 19.160 (1979) (automatic assessment of 10% penalty for appeal of money judgment without probable cause); Ky. Rev. Stat. Section 26A.200 (1985) (automatic 10% penalty assessed against all appeals of money judgments except first appeal); L.S.A.-R.S. 4203 (Louisiana statute authorizing interest on money judgment and tort action from date of judicial demand); Ga. Code Ann. Sections 5-6-6, 5-7-2 (appeal penalty of 10% of judgment); Va. Code Ann. 16-1-113 (Supp. 1986) (10% mandatory appeal penalty regardless of stay); Wisc. R. Civ. P. 809.25(3), 809.83(1) (authorizes maximum 10% penalty in addition to damages for delay and attorneys fees); Utah R. Civ. P. 73(1) (damages not to exceed 25% of judgment for frivolous appeal); workers' compensation statutes, *see, e.g.*, Miss. Code Ann. Section 71-3-107 (1972) (mandates double compensation benefits for minors illegally employed); Miss. Code Ann. Section 71-3-37 (1972) (automatic penalties for failure to timely pay worker's compensation benefits based upon 10% and 20% of money due); 33 U.S.C. Section 914 (similar provision in LHWCA); and taxation, *see, e.g.*, Miss. Code Ann. Section 27-35-45 (1972) (automatic penalty for failure to list property for tax assessment based upon 5% of value of property); 26 U.S.C. Section 6652 (authorizing penalty for failure to report tips as income in the amount of 50% of unreported amount unless due to reasonable cause); 26 U.S.C. Section 6653 (5% penalty and 50% of payable interest for negligent underpayment of taxes; 75% penalty and 50% of payable interest for fraudulent underpayment of taxes).

Any holding to the contrary would create more uncertainty and delays in the resolution of judicial disputes, a result which clearly should be avoided.

II. CONCLUSION

Both the Mississippi legislature and the Mississippi Supreme Court have recognized on numerous occasions the necessity for a procedure to curb abuses of the automatic right of appeal. Moreover, both the legislative and judicial branches of our state have recognized the vital role played by 11-3-23 in meeting this interest.

This Honorable Court held long ago that a state was authorized to impose a mandatory penalty on unsuccessful appellants and that such a purely state procedure implicated no federal constitutional rights. *See, Stewart, supra.* This Honorable Court should not displace the judgment of the state branches of government particularly where, as here, the statute is applied equally and does not prevent access to Mississippi's appellate court.

Respectfully submitted,

PAUL S. MINOR
Counsel of Record
MINOR AND BENTON
P.O. Drawer 1388
Biloxi, MS 39533
(601) 374-5151
Attorneys for Amicus Curiae Mississippi Trial Lawyers Association

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No. 85-1765

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

APPELLEE'S POST-ARGUMENT BRIEF

BRUCE J. ENNIS, JR.*
MARK D. SCHNEIDER
DONALD B. VERRILLI, JR.
ENNIS FRIEDMAN & BERSOFF
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100

ERNEST R. SCHROEDER
VINCENT J. CASTIGLIOLA, JR.
P.O. Drawer 1529
1103 Jackson Avenue
Pascagoula, Miss. 39567
(601) 762-6631
Attorneys for Appellee

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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On Appeal from the Supreme Court of Mississippi

APPELLEE'S POST-ARGUMENT BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

I. By order dated December 14, 1987, the Court granted leave for Appellee to file a post-argument brief addressing the questions noted in Appellee's Conditional Motion For Leave To File Brief After Argument ("Cond. Motion"). The principal question is whether the federal Due Process Clause requires states to adopt more definite standards for fixing the amount of punitive damage awards in civil cases than the common law standards applied below. That procedural Due Process "standards" question was raised by the Court during oral argument. Transcript of Oral Argument at 30-41. It was never raised by Appellant at any stage of the proceedings below, and is not raised or fairly included in the questions presented to the Court.

II. On the merits, every federal court that has addressed the issue has ruled that even in *criminal* cases the federal Due Process Clause does not require definite sentencing standards. *A fortiori*, the common law standards Mississippi uses to guide jury discretion in awarding punitive damages do not violate the Due Process Clause.

ARGUMENT

I. THE DUE PROCESS STANDARDS QUESTION WAS NEVER PRESENTED BELOW.

The Due Process standards question is not before the Court for three reasons. First, that question was not raised in the court below. A *different* Due Process question was raised in Appellant's Brief on Appeal to the Mississippi Supreme Court, where Appellant argued that the "threat of unrestricted punitive damage awards" has a "chilling effect on the exercise of . . . [the] right of access to the courts." Jurisdictional Statement ("J.S.") 135a.

This "chilling access" claim is different from the "standards" claim raised during oral argument. States could adopt very definite standards—for example, that punitive damage awards cannot exceed 50% of a defendant's net worth, or cannot exceed 100 times the compensatory damages, or must be limited by a fixed cap of $2 million—and the permissible award could still be so large as to "chill" a defendant's desire to contest the underlying dispute. A court could resolve the "chilling access" question without considering the "standards" question. Thus, the "standards" question is not a mere enlargement of the "chilling access" question, and because it was not raised in the Mississippi Supreme Court, it is not before the Court. See *Dewey v. Des Moines*, 173 US 193, 198 (1899).

Second, Appellant did not raise either the "standards" question *or* the "chilling access" question at the trial level. Accordingly, the Mississippi Supreme Court did not con-

sider those questions, as it consistently refuses to consider foreseeable constitutional questions raised for the first time on appeal.[1] Accordingly, the Mississippi Supreme Court's refusal to consider those questions is an adequate and independent state ground that precludes review by this Court. See, *e.g.*, *Lynch v. New York*, 293 US 52, 54-55 (1934).

Third, neither question is raised or fairly encompassed in the questions presented to this Court. See Cond. Motion at 1-2, and authorities cited. In Question 1, Appellant argues that the award violates the Due Process Clause, but *only* "because it is vastly out of proportion to any penalties provided by the Mississippi legislature for similar or analogous improper business activities," or "because it was imposed under a [substantive] standard of conduct newly formulated by the court below and applied retrospectively." [2]

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[1] Mississippi Supreme Court Rule 6(b). See cases cited in Brief of Appellee at 26, n.37; *Smith v. Fluor*, 514 So.2d 1227 (Miss. 1987); *Witt v. Mitchell*, 437 So.2d 63, 66 (Miss. 1983); *Stewart v. City of Pascagoula*, 206 So.2d 325, 328 (Miss. 1968). *Town of Madison v. Bear Creek Water Ass'n*, 510 So.2d 800 (Miss. 1987), and *Griffin v. Mississippi*, 504 So.2d 186 (Miss. 1987), are not contrary. In *Town of Madison, both* parties asked the court to consider the new issue, and it was not a constitutional issue. *Griffin* is consistent with a recognized but narrow exception to the general rule, which allows criminal defendants to raise on appeal constitutional issues involving errors committed during trial even though the defendant failed to make a contemporaneous objection. See *Taylor v. State*, 452 So.2d 441, 450 (Miss. 1984).

[2] Brief of Appellant, at i. Neither of *these* Due Process claims was raised in the court below. In its Petition for Rehearing, Appellant made a "change of law" argument, but based that argument solely on the Equal Protection Clause. J.S. 138a.

II. THE STANDARDS EMPLOYED BELOW FOR FIXING AND REVIEWING THE PUNITIVE DAMAGE AWARD SATISFY THE REQUIREMENTS OF THE FEDERAL DUE PROCESS CLAUSE.

The requirements of due process vary depending upon the practice under review. More protective procedures are required if the action is criminal rather than civil, or if the interest involved is life or liberty, rather than property. See *Parratt v. Taylor*, 451 US 527 (1981). Punitive damages implicate a property interest, and always have been considered civil. As far as Appellee is aware, no court has ever applied *any* of the procedural safeguards required in criminal prosecutions to punitive damage awards.[3] Accordingly, the Due Process Clause permits less protective procedures in the context of punitive damages than in the context of criminal sentencing. As we will show, however, Mississippi's standards for fixing and reviewing the amount of punitive damage awards satisfy even the due process requirements for *criminal* sentencing.

The Due Process Clause places some limits on criminal sentencing, but it does *not* require fixed or definite sentencing standards. The limits it *does* place on criminal sentencing demonstrate *a fortiori* that Mississippi's punitive damages law provides due process. Thus, a sentence may not be based on illegal considerations, *United States v. Lemon*, 723 F.2d 922 (DC Cir. 1983), on an error of fact, *United States v. Tucker*, 404 US 443 (1972), or on vindictiveness. *North Carolina v. Pearce*, 395 US 711 (1969). When the amount of punishment is discretionary, the defendant is entitled to have the sentencer exercise its

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[3] See, to the contrary, *Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984), *cert. denied*, 470 US 1051 (1985); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986); *Brotherton v. Celotex Corp.*, 202 N.J. Super. 148, 493 A.2d 1337, 1344-45 (1985); see *generally United States v. Ward*, 448 US 242 (1980). Appellant did not risk incarceration, loss of voting rights, or other consequences of criminal conviction.

discretion in fixing sentence. See, *e.g.*, *Gregg v. Georgia*, 428 US 153, 189 (1976), citing *Pennsylvania ex rel. Sullivan v. Ashe*, 302 US 51, 55 (1937). Such requirements protect a defendant's due process right to a non-arbitrary sentence even when there are no precise standards for fixing punishment. Defendants do not have a due process right to know the exact punishment for wrongdoing.[4]

In fact, state laws typically set a very wide range of punishment for a given offense,[5] and judges have almost

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[4] Due process requirements for imposing criminal *liability* mandate far more definite standards than are required for fixing sentence once guilt is determined. Due process requires states to make explicit the nature of the substantive conduct they wish to criminalize. See, *e.g.*, *Baggett v. Bullitt*, 377 US 360 (1964). Specificity concerning the substantive offense is required so that individuals can conform their conduct to the law, and so that the substantive law will not "encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 US 352, 356 (1983). These interests are far less relevant to the process of criminal *sentencing*, or of fixing the *amount* of a punitive damage award.

In criminal cases the sentencer fixes punishment only after guilt has already been determined under constitutionally adequate standards. Similarly, the jury fixes the amount of punitive damages only if liability for actual damages is established *and* the judge and jury both determine that the evidence warrants punitive damages under well-established liability standards that are not at issue here. See *State Farm v. Simpson*, 477 So.2d 242, 252 (Miss. 1985).

[5] Criminal sentencing provisions typically set an upper limit within which a penalty must be fixed. Mississippi's punitive damages law does not prescribe a precise monetary "cap." The distinction is without relevance. The "cap" in many criminal statutes is so high, and the range of permissible sentences so broad, that there is effectively no limit. In capital cases, of course, the upper limit is death. In non-capital cases, there is often an enormous range of permissible sentences for the same substantive offense. For example, under the newly enacted federal sentencing law, a Class A Felony is punishable from no incarceration to life imprisonment. 18 U.S.C. § 3581(b). Moreover, there *is* a limit on punitive damages under Mississippi law. The law requires that the net worth of the defendant be considered, and an award that, for example, equalled a defendant's net worth would violate Mis-

unreviewable discretion in fixing sentence. *Wasman v. United States*, 468 US 559 (1984); *United States v. Tucker*, 404 US 443 (1972). Appellee is aware of *no* case holding that a law establishing a broad range of permissible sentences, or granting unguided discretion to the jury to set a sentence within that range, violates due process. To the contrary, due process challenges to standardless jury sentencing have been universally *rejected*. See *Garcia v. United States*, 769 F.2d 697, 699 & n.1 (11th Cir. 1985); *R.G. Britton v. Rogers*, 631 F.2d 572, 578-581 (8th Cir. 1980), *cert. denied*, 451 US 939 (1981); *Vines v. Muncy*, 553 F.2d 342, 347-348 (4th Cir.), *cert. denied*, 434 US 851 (1977). *Cf. Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) (upholding against due process challenge a 200 year bench sentence under a statute that permitted sentence between ten years and "any number of years"). As this Court has noted in *dicta*, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 US 586, 603 (1978) (plurality opinion). See also *Solem v. Helm*, 463 US 277, 290 (1980), referring to the

> broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.[6]

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sissippi law. In contrast, criminal fines often *exceed* the defendant's net worth, but have never been found to violate the Due Process Clause for that reason. In any event, the award at issue here was only one-half of one percent of Appellant's net worth.

[6] *Giaccio v. Pennsylvania*, 382 US 399 (1966), is not contrary. There the Court found violative of due process a law allowing juries to punish criminal defendants for "reprehensible" conduct even when the defendant was *not guilty* of the charged offense. Because that was tantamount to fining defendants for "reprehensible" conduct without defining "reprehensible," the Court found the law unconstitutionally vague. The Court noted, however, that it "intend[ed] to cast no doubt whatsoever on the constitutionality

Only in the context of capital sentencing has the Court ruled that guided discretion is constitutionally required. Even in that context, however, the Court has based the requirement on the Eighth Amendment and the unique characteristics of capital sentencing. *Gregg v. Georgia*, 428 US 153 (1976). The Court has explicitly declined to extend that holding to other types of criminal sentencing, see *Lockett v. Ohio*, 438 US 586, 603 (1978), or to base such a right in the Due Process Clause. See *McGautha v. California*, 402 US 183, 185, 190 (1971) (capital sentencing scheme which gave juries "absolute discretion," and provided "no standard for the guidance of the jury," did *not* violate the Due Process Clause).

Except in capital sentencing, most states employ standardless discretionary sentencing schemes because they permit flexibility, which is a valued component of sentencing determinations. Thus, most states allow the sentencer to consider without limitation or guidance all of the particular circumstance of the offense and the offender in fixing punishment.[7]

Moreover, although criminal sentencing provisions do not violate the Due Process Clause even if they are entirely standardless, Mississippi's punitive damages law *does* guide jury discretion in fixing punitive damage awards, and provides standards for trial and appellate review of such awards. Under Mississippi law, once it has been determined that punitive damages in some amount are permissible, jurors are instructed—as they were in this case without objection—that the amount is to be determined by considering the nature of the offense,

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of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.* at 405 n.8.

[7] See generally *Woodson v. North Carolina*, 428 US 280, 303-305 (1976), and cases cited. For capital sentencing, individualized sentencing is constitutionally *required* under the Eighth Amendment. *Id.*

the need to punish the defendant, and the need to deter the defendant and others from similar conduct in the future, taking into consideration the financial worth of the defendant.[8] See *Bankers Life & Casualty Co. v. Crenshaw*, J.S. 49a-52a. Although those standards leave the jury considerable discretion, this Court has always considered such discretion not only constitutionally permissible, but wise.[9]

A jury's punitive damage award serves another socially valuable purpose. A jury "express[es] the conscience of the community." *Witherspoon v. Illinois*, 391 US 510, 519 (1968). See also *Gregg v. Georgia*, 428 US 153, 181 (1976) (sentencing decisions of juries are "a significant and *reliable objective index* of contemporary values") (emphasis added). That those community values cannot be reduced to a precise formula either in criminal sentencing or in fixing punitive damage awards is not a vice, but a virtue of the jury system:

> [T]he inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity and flexibility into a legal system."

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[8] Similar standards prevail in nearly every state that authorizes punitive damage awards. See Restatement (2nd) Torts, § 908 (1979); Annotation, Excessiveness Or Inadequacy Of Punitive Damages In Cases Not Involving Personal Injury Or Death, 35 ALR 4th 538.

[9] See *Day v. Woodworth*, 13 How. 363, 371 (1851) (noting, with approval, that punitive damage awards had "been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the particular circumstances of each case"); *Missouri Pacific Ry. Co. v. Humes*, 115 US 512, 521 (1885) ("the discretion of the jury in [fixing punitive damages] is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuation of the practice"). Both of these cases are cited with approval in *Smith v. Wade*, 461 US 30, 35 n.3 (1983).

McClesky v. Kemp, —— US ——, ——, 95 L.Ed.2d 262, 291 (1987) (citation omitted).[10]

Moreover, in Mississippi, trial courts and the Supreme Court will reduce or vacate punitive damage awards if they are excesive in light of those standards, or if the jury lacked adequate information to apply those standards.[11]

Finally, a ruling that the Due Process Clause requires more definite standards for fixing punitive damage awards than the common law requires would have enormous consequences. Such a ruling would invalidate the punitive damages law in the majority of states and under federal law. It would also constitutionalize the ongoing policy debate as to the wisdom of fixed versus discretionary sentencing schemes, and would inevitably draw into question the constitutionality of criminal sentencing provisions in states that have chosen discretionary sentencing schemes.

Moreover, such a ruling would effectively require the Court to scrutinize every criminal sentence and every civil penalty to determine whether the process for fixing the penalty was sufficiently guided to satisfy due process.

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[10] As noted *supra*, the Due Process Clause does not give a wrongdoer the right to know with certainty the cost of his misconduct. See *Smith v. Wade*, 461 US 30, 50 (1983). Here appellant mistakenly thought it knew the cost of its intentional misconduct, and made a business decision that such a cost was worth the risk. See J.S. 47a, 19a; Record 1243-44; Brief of Appellee, at 4.

[11] See, *e.g.*, *Snowden v. Osborne*, 269 So.2d 858, 861 (Miss. 1972) (reversing punitive damage award because record was silent on defendant's worth); *Mutual Life Ins. Co. v. Wesson*, —— Miss. —— (Nov. 12, 1987) (holding that a punitive damage award of $8 million was "excessive after applying the established standards," and ordering remittitur of $6.5 million) (slip op. at 18-19). *Wesson* relied on Miss. Code Ann. Sec. 11-1-55, which authorizes remittitur of "excessive" awards, or awards "influenced by bias, prejudice, or passion" or "contrary to the overwhelming weight of credible evidence."

CONCLUSION

The Court should not address the Due Process standards question, which is not before the Court. Alternatively, the Court should rule that the Due Process Clause was not violated by the award in this case.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
MARK D. SCHNEIDER
DONALD B. VERRILLI, JR.
ENNIS FRIEDMAN & BERSOFF
1200 17th Street, N.W.
Washington, D.C. 20036
(202) 775-8100

ERNEST R. SCHROEDER
VINCENT J. CASTIGLIOLA, JR.
P.O. Drawer 1529
1103 Jackson Avenue
Pascagoula, Miss. 39567
(601) 762-6631

Attorneys for Appellee

* Counsel of Record

December 23, 1987